87-1187

No. 87-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

THE HONORABLE ALCEE L. HASTINGS,
UNITED STATES DISTRICT JUDGE,

Petitioner,

v.

THE JUDICIAL CONFERENCE OF THE UNITED STATES, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Did the court of appeals properly employ issue preclusion and avoidance doctrine to again deny the plaintiff federal judge an adjudication of the merits of his claim that the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 (the"Act") is unconstitutional?

2. Does the assignment of powers to the judiciary and the specification of procedures for their exercise against the individual federal judges made by the Act conflict with the allocation of powers and the specification of procedures established by the Constitution?

3. Did the court of appeals err in ruling that the Act's requirement that the Judicial Conference certify determinations to the House of Representative did not implicate separation-of-powers principle or undermine the exclusivity of the assign-

ment of the impeachment power?

(a) Did Congress only confer an option that did not implicate constitutional principle when it mandated that the Conference "shall . . . certify and transmit the determination and record of proceedings" for review by the House in any case in which "the . . . Conference concurs in the determination of the council" that a federal judge "has engaged in conduct . . . which might constitute one or more grounds for impeachment" based upon an investigation conducted pursuant to the Act?

(b) Is a determination certified to the House by the Judicial Conference based upon and accompanied by a record complied through the exercise of the investigatory and subpoena powers granted by the Act so like a recommendation submitted by any other individual or group that any difference in its effect on

Congress is without constitutional significance?

4. Did the court of appeals properly avoid adjudicating specific claims that the Act conflicts with the guarantees established by the Compensation and Due Process Clause of the Constitution, claims which it acknowledged had not been addressed or resolved in the four years of litigation that preceded its decision?

PARTIES IN THE COURT OF APPEALS

The appellant in the court below and the petitioner here is the Honorable Alcee L. Hastings, a United States district judge in active service on the United States District Court for the Southern District of Florida. The appellees below and respondents here are the Judicial Conference of the United States (the "Judicial Conference"); Chief Justice of the United States, originally the Honor-

able Warren E. Burger and presently the Honorable William F. Rehnquist; the Judicial Conference's Committee to Review Circuit Council Conduct and Disability Orders; the Judicial Council of the Eleventh Circuit (the "Council"); the Honorable John C. Godbold, former Chief Judge of the Eleventh Circuit; the Honorable Gerald Bard Tjoflat and the Honorable Frank M. Johnson, Jr., circuit judges in active service on the United States Court of Appeals for the Eleventh Circuit; the Honorable Sam C. Pointer (N.D. Ala.) and the Honorable William C. O'Kelley (N.D. Ga.), district judges in active service on district courts within the Eleventh Circuit; and the United States of America, as intervener.

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In the
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THE HONORABLE ALCEE L. HASTINGS,
UNITED STATES DISTRICT JUDGE,
Petitioner,

v.

THE JUDICIAL CONFERENCE OF THE UNITED STATES, *et al.*,
Respondents.

PETITION

United States District Judge Alcee L. Hastings petitions this Court to issue a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review the judgment that court entered against him.

OPINIONS BELOW

The opinion of the court of appeals is reported as *Hastings v. Judicial Conference of the United States*, 829 F.2d 91

(D.C. Cir. 1987), and is set out in the appendix to this petition at 1-77. Judge Buckley filed a partial dissent that is set out at 178-85. The district court filed a memorandum opinion with its final order that is reported under the same name at 657 F. Supp. 672 (D.D.C. 1986) both are set out in the appendix at 86-97.

JURISDICTIONAL STATEMENT

The judgment of the court of appeals was entered on September 15, 1987 (A. 98-99). On December 15, 1986, the court extended the time within which this petition might be filed until January 13, 1988 (Brennen, J.). The present petition was filed on that date and within the period specified by 28 U.S.C. § 2101(c) (1982) as extended. The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1)(1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case concerns the constitution-

ality of the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 (the "Act"), Pub. L. No. 96-458, 94 Stat. 2035 (1980), *codified as amended at* 28 U.S.C. §§ 331, 332, 372(c), 604(h)(1982 and Supp. 1984). The provisions of the Act are set out in the appendix at 106-32. Resolution of the constitutional questions presented would involve the following provisions of the Constitution of the United States: U.S. const., art. I, § 1 (legislative powers), § 2, cl.5 (power of impeachment), § 3, cls. 6 and 7 (trial and judgments on impeachment), § 8, cl. 9 (inferior courts) and cl. 18 (necessary and proper); art. II, § 1, cl. 1 (executive power), § 2, cl. 2 (appointments), § 4 (impeachments); art. III, § 1 (tenure and compensation), § 2 (judicial power); amends. I (free speech and redress of grievances); V (due process). Those provisions are set out in

the appendix at 100-05.

STATEMENT OF THE CASE

The material facts and reasons why the Court should grant the petition can be stated in a paragraph. The Act assigned unprecedented power and broad discretion to specified judicial agencies and officers to enable them to effectively regulate, investigate, and sanction the conduct of every federal judge. All who have studied the matter over the years have recognized that any system like that established by the Act would raise substantial constitutional questions,[1]

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1 *See, e.g.*, Kaufman, *The Essence of Judicial Independence*, 80 Colum. L. Rev. 671 (1980), and *Chilling Judicial Independence*, 88 Yale L.J. 681 (1979) (circuit judge); Ervin, *Separation of Powers: Judicial Independence*, 35 Law & Contemp. Probs. 108 (1970) (former United States Senator); Holloman, *The Judicial Reform Act: History, Analysis, and Comment*, *id.* at 128 (former Chief Counsel, Senate Judiciary Committee); Kurland, *The Constitution and the Tenure of Federal Judges: Some Notes from History*, 36 U. Chi. L. Rev. 665 (1969) (professor of law); and Ziskind, *Judicial Tenure in the American*

questions that only the Court could resolve. The Act has been fully implemented and applied over the past six years. The petitioner is a federal judge against whom the Act has been extensively applied. For more that four years, he has pursued his claims that the Act was unconstitutional in order to present the issues to the Court in a proper record. The present case has joined all necessary and proper parties and has developed a

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Constitution: English and American Precedents, 1969 Sup. Ct. Rev. 135 (historian); Note, *Unnecessary and Improper: The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, 94 Yale L.J. 1117 (1985). *Contra*, R. Berger, "Exclusivity of Impeachment and Judicial 'Good Behavior' Tenure," *Impeachment: The Constitutional Problems*, 122-80 (1973) (historian) *See also, e.g., Randall v. Brigham*, 74 U.S. (7 Wall.) 523, 537 (1968); *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 354 (1871); *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74, 74-89 (1970) (majority, 89-129 (Harlan, J., concurring in result), 129-41 (Douglas J., dissenting), 141-43 (Black, J., dissenting); *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982).

record that establishes a proper adjudicatory context within which the constitutional issues may be fully explored and finally resolved. The present petition brings that record before the Court. The Court should grant review in the case to resolve those issues so that all judges and officials in other branches may understand the rights and obligations that are incident to the office of United States judge.

In other cases, that paragraph might suffice. The present case involves Judge Hastings, however, and brings with it a six-year history that suggests the case and the reasons why review should be granted should be developed is somewhat greater detail. The necessary development is set out below.

The Nature of the Action

This action again challenges the constitutionality of the Act and of the man-

ner in which it has been implemented and applied. The Act assigns the Judicial Conference, the Chief Justice, and the judicial council and chief judge of each circuit power to investigate and sanction any United States judge whose conduct does not satisfy the norms they prescribe. The Act also requires that if a circuit council determines that a federal judge "has engaged in conduct . . . which might constitute . . . grounds for impeachment" and if the Judicial Conference "concurs in the determination," then the Conference must certify to the House of Representative (the "House") that "consideration of impeachment may be warranted" and transmit the record complied under the Act to the House for whatever action it considers necessary. 28 U.S.C. § 372(c)(7)(B), (8). The Act has been fully implemented, and these agencies and officers have exercised their assigned powers. The present action

was brought by a United States district judge against whom those judicial agencies and officers who have exercised and are exercising the assigned powers.

The Material Facts

In 1979, President Carter appointed Alcee L. Hastings a United States district judge to serve on the district court in Miami, Florida. In 1981, the Justice Department initiated an investigation that culminated when a Miami grand jury returned an indictment alleging that Judge Hastings had been a participant with a Washington lawyer in a conspiracy to solicit and accept a bribe.[2] There was no

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2 The investigation and indictment are summarized in *United States v. Hastings*, 681 F.2d 706 (11th Cir. 1982), and are more fully described in the petition asking the Court to determine whether the Constitution required that impeachment by the House and trial and removal by the Senate *precede* prosecution by the executive and trial by the courts. *See* Petition for Writ of Certiorari, *Hastings v. United States*, 459 U.S. 1203 (1983) (cert. denied).

doubt of the lawyer's culpability, and he was convicted in 1982. In February 1983, however, a jury rejected what the prosecutors acknowledged was circumstantial evidence and acquitted Judge Hastings.

In March 1983, six weeks after the trial, two district judge members of the Judicial Council filed a complaint under the Act (the "1983 Complaint"). That complaint alleged that Judge Hastings was guilty of the offense of which he had been acquitted and asked that the Council so determine so that the allegations could be certified to the House. The chief judge of the circuit appointed himself and the other judges named as defendants below to serve as a special committee (the "Investigating Committee") to investigate the 1983 complaint.[3] Judge Hastings

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3 The acquittal, 1983 complaint, and the litigation initiated by the Investigating Committee's immediate request for the record of the grand jury that investigated Judge Hastings are summarized in *In*

promptly asked the Director of the Administrative Office of the United States Courts to confirm that funds would be provided to enable him to defend himself in proceedings under the Act. The Director denied that request. In December, Judge Hastings filed the first action seeking a declaratory judgment that the Act and the manner in which it had been implemented and applied were unconstitutional.

In July 1984, after extensive briefing and the development of a full record, the district court decided that Judge Hastings's claims were fully ripe for ad-

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re Petition to Inspect and Copy Grand Jury Material (Hastings), 735 F.2d 1261 (11th Cir. 1984) (special panel) and are more fully described in the petition asking this court to determine whether the lower courts had properly exercised inherent authority to authorize disclosure of the entire record of a grand jury's proceedings upon the request of a special committee appointed to reinvestigate the same allegations that had occupied the grand jury. See Petition for Writ of Certiorari, *Hastings v. Investigating Committee of the Judicial Council of the Eleventh Circuit*, 469 U.S. 884 (1984)(*cert. denied*).

judication. It entered a summary judgment finding that the Act was facially constitutional and itself precluded the courts from exercising jurisdiction over any constitutional claims arising from its implementation and application against Judge Hastings.[4] Judge Hastings promptly appealed. Two months later, in September, an attorney from the middle district of Florida filed a complaint (the "1984 Complaint") alleging that Judge Hastings had violated "the law prohibiting campaigning by Federal employees" in a speech he had given in a church in St. Petersburg, Florida. The chief judge reappointed the Investigating Committee to investigate the facts and allegations in that complaint.

In April 1985, the Investigating Committee notified Judge Hastings that formal

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4 *Hastings v. Judicial Conference of the United States*, 593 F. Supp. 1371 (D.D.C. 1984), *vacated and remanded*, 770 F.2d 1093 (D.C. Cir. 1985), *cert. denied*, 106 S. Ct. 3272 (1986).

proceedings on the 1983 Complaint would commence in May and specified the procedures it would follow. Judge Hastings promptly filed a special appearance reaffirming that he would not appear or participate until his constitutional claims had been fully adjudicated. The Investigating Committee also subpoenaed one of Judge Hastings's then law clerks, four of his former law clerks, and two of the lawyers who had represented him in the criminal proceedings. Three of the law clerks and both lawyers objected to those subpoenas, giving rise to further litigation.

In mid-1985, the court of appeals below issued its decision in the first declaratory judgment action, holding that none of Judge Hastings's constitutional claims with respect to the Act's facial validity or the manner in which had been applied were ripe for adjudication. *Hast-*

ings v. Judicial Conference of the United States, 770 F.2d 1093 (D.C. Cir. 1985) (*"Hastings I"*), *cert. denied,* 106 S. Ct. 3272 (1986).5 Thereafter a special panel designated to sit as the court of appeals for the Eleventh Circuit undertook to determine the constitutional issues that the law clerks had standing to raise and that were ripe for adjudication in the subpoena-enforcement proceedings. That panel issued its opinion in February 1986. *In re Certain Complaints Under Investigation by an Investigating Committee of the Judicial Council of the Eleventh Circuit,* 783 F.2d 1488 (11th Cir.) (special panel), ("Certain Complaints") *cert. denied,* 106

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5 The on-going investigation and related proceedings are summarized in *Hastings I.* They are more fully developed in the petition asking the Court to review decision on ripeness and to determine the underlying constitutional questions presented there (and renewed here). *See* Petition for Writ of Certiorari, *Hastings v. Judicial Conference of the United States, No. 85-1301,* 106 S.Ct. 3272 (1986) (*cert. denied*).

S. Ct. 3273 (1986).[6]

In August 1986, the Investigating Committee filed its report and recommendations with the Council. Between April 1985 and August 1986, the Investigating Committee had held hearings on twenty-seven days, twenty-six in Atlanta, Georgia, and one in Darlington, South Carolina. During those hearings, it had received some 2800 exhibits and produced a 4880-page transcript. Its report and rec-

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6 The investigative and related proceedings through mid-1985 are summarized in *Certain Complaints* and more fully developed in the petition asking the court to review the special panel's determinations (1) that the Act assigned exclusive jurisdiction to the court of appeals over proceedings to enforce subpoenas issued pursuant to the power the Act assigned to special committees, (2) that none of the assigned powers that the clerks had standing to challenge was unconstitutional, and (3) that the judicial privilege did not protect in-chambers conversations between judge and his law clerks from compelled to disclosure to a special committee conducting an investigation under the Act. *See* Petition for Writ of Certiorari, *Hastings v. Godbold*, No. 85-1609, 106 S. Ct. 3273 (1986) (*cert. denied*).

ommendations spanned 381-pages and was accompanied by a two-volume appendix. The Investigating Committee recommended that the Council determine that Judge Hastings was guilty of the offense in which he had been tried and acquitted and that he had presented false testimony and fabricated evidence at his trial.[7] The Investigating Committee advised that its investigation into the 1984 Complaint was continuing. The Council declined to provide a copy of any of these materials to Judge Hastings. Judge Hastings refiled the action that gave rise to the proceedings in this case.

The proceedings against Judge Hastings continued to evolve while the action was in the courts below. In September, the Council made the requested determination in the proceedings initiated by the

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7 The prosecutors had fully cross-examined Judge Hastings and had presented that claim to the jury at the original trial in February 1983. See notes 8 and 9 *infra*.

1983 Complaint and certified the matter to the Judicial Conference. On March 17, 1987, the Judicial Conference concurred in the Council's determination and transmitted the required certificate to the Speaker of the House. On March 23, two members of the House introduced a one-sentence resolution to assure that the allegations certified by the Judicial Conference would come before the House for a full vote. The House Committee on the Judiciary filed a request asking the courts to transmit the entire record of the proceedings before the 1981 grand jury for use in the legislative branch.[8]

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8 The events that occurred through March 17, 1987, are summarized in the opinion below (A. 11-26) and developed fully in the record. Subsequent developments are matters of public record in the litigation initiated by House Committee on the Judiciary. *In re Request for Access to Grand Jury Material-Grand Jury 81-1 (Miami)* (Hastings), 833 F.2d 1438 (11th Cir. 1987) (special panel), and *In re Grand Jury 86-3 (Miami)*, 673 F. Supp. 1569 (S.D. Fla. 1987) (mem. op.), *appeal pending*, No. 87-6070 (11th Cir.) (special

In the course of those evolving proceedings, it has been disclosed that the Justice Department filed a further complaint against Judge Hastings pursuant to the Act in September 1986 (the "1986 Complaint"). That complaint was based upon a telephone conversation between a criminal suspect and an attorney that the Department intercepted. According to the Department the suspect reported to the attorney that Judge Hastings, who had authorized the wire-tap, had cautioned the elected mayor of Dade County to stay away from the suspect because he was "hot." According to the new complaint, the Department used the grand jury to investi-

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panel) (to be argued January 21, 1988). (See note 9 *infra* and accompanying text). These developments may properly be considered by the Court. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 114 (1976), and *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 143 (1974) (concerning consideration of events occurring after decision in the court of appeals).

gate and determine that the mayor did claim that it was Judge Hastings who had told him to stay away from the individual, but also represented that Judge Hastings had not indicated that the suspect was under surveillance. The Department did not seek or obtain an indictment. The new chief judge of the Eleventh Circuit duly appointed a new special committee to investigate the Department's 1986 Complaint. After that investigation had started, the Department transmitted information to the House Judiciary Committee that has generated requests to the courts that the electronic surveillance material and the mayor's 1986 grand jury testimony be disclosed to the House committee for use in its impeachment inquiry.[9]

Over the past five years, Judge Hast-

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9 The events are documented in the records in *In re Access* and *In re Grand Jury 86-3 (Miami)* and may be considered by the Court in this case. See note 8, *supra*, and authorities cited.

ings has expended personal funds and incurred liabilities in excess of one million dollars to defend himself in the proceedings initiated by the complaints under the Act and to protest the rights he and, until recently, all federal judges have held under the Constitution. The end is still not in sight. At the present time, the investigations into the 1984 and 1986 Complaints are pending and formal hearings have yet to be held on either. These are the facts that provide the context in which the Court may assess his claim that the Act is unconstitutional.

The Proceedings Below

Proceedings in the district court were completed in three weeks. The complaint was filed in the district court on August 25, 1986. That court's jurisdiction was invoked pursuant to 28 U.S.C. § 1331 (1982). Judge Hastings sought a preliminary injunction and incorporated the

record compiled in *Hastings I* as part of the record below. On September 9, the respondents filed their motion to dismiss. The Court heard argument on September 11. On the following day, it filed an order denying the motion for preliminary injunction and granting the motion to dismiss for failure to state a claim upon which relief could be granted (A. 97) accompanied by a brief memorandum opinion (A. 86-96). Judge Hastings filed his notice of appeal on September 15. The court of appeals reversed the decision insofar as it related to Judge Hastings's claims that the Act had been applied in a manner that violated his right to due process. It affirmed the dismissal of the facial challenge to the Act.

The court again declined to adjudicate Judge Hastings claim that the Act-as-a-whole was unconstitutional, this time ruling that he was precluded from reliti-

gating issues concerning the investigative powers that had been decided in the proceedings to enforce the subpoenas served on his law clerks, *Certain Complaints* (A. 26-38). The court declined to address the separation-of-powers challenge to the statutory plan because it ruled that "'fragmentary analysis' of legislation is in fact the norm in our judicial system'" and that appellant had not "plausibly" established that "the peril of fragmented review" was present in this case (A. 34-35). It determined that it could consider the separation-of-powers claims only as they related to specific powers that had not been upheld in *Certain Complaints* (*id.*). The court acknowledged that the court had ruled in *Certain Complaints* that the law clerks did not have standing to raise any of Judge Hastings due-process claims addressed the to facial validity of the Act (A. 33). Nonetheless, it relied

upon the determination to fragment those claims also (A. 50-66).

For example, Judge Hastings had claimed that the combination of powers and functions in the same hands, coupled with prohibition against any judicial review of the manner in which they were exercised, violated due-process as well as separation-of-powers principles (A. 52-53). The methodology the panel employed to fragment and unbundle the claim illustrates the concerns raised by its application of avoidance doctrine throughout. The panel ruled that the issues arising from the fragment of the claim that related to the executive function of investigation were precluded (A. 51) while those that related to the legislative power to adopt substantive rules of conduct were resolved because those powers were necessary to salvage the Act from an overbreadth claim (A. 59-66). As unbundled, the panel ruled

that the remaining combination of investigative and adjudicative functions satisfied the standard for administrative agencies whose adjudications are subject to review by Article III courts that was prescribed in *Withrow v. Larkin*, 421 U.S. 35 (1975) (A. 53-56). The panel did not deem the Act's prohibition against review by Article III courts worthy of analysis, apart from the implicit view that judges entrusted with power are less likely than other mortals to abuse it. (*See, e.g.*, A.56, 62 n.59).[10]

The lower court's methodology is further illustrated by its disposition of the claim that divided the panel. Judge Hastings's claim that the statutory requirement that the Judicial Conference certify

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10 *Cf. e.g., The Federalist No. 47 (Madison)* 323-27 (Cooke ed. 1967) (defining "the essence of tyranny" and expressing a different view concerning the susceptibility of judges to the temptations of power).

determinations to the House of Representatives conflicted with established separation of powers principles and undermined the exclusivity of the assignment of the impeachment power.

The majority agreed that:

> weighty constitutional issues would arise if certification by the Conference to the House were *mandatory*, because such a scheme would (1) require Article III judges to make a determination that is arguably an exercise of the judicial power yet subject to review by another branch of government or (2) force members of the Judicial Branch to make initial determinations concerning the impeachability of judges, arguably in violation of the Constitution's exclusive assignment of the impeachment power to the Legislative Branch.

(A. 40; footnotes omitted; emphasis added.) The majority viewed the certification requirement as "implicitly conditional", however. (A. 42).

The Act provides:

> *In any case in which the judicial council determines* on the basis of a complaint and inves-

> tigation under this subsection [28 U.S.C. § 372(c) . . . that a judge appointed to hold office during good behavior has engaged in conduct . . . which might constitute one or more grounds for impeachment under the Constitution; . . . *the judicial council shall promptly certify such determination* together with any complaint and a record of any associated proceedings to the Judicial Conference of the United States

28 U.S.C. § 372(c)(7)(B), with emphasis as added by the panel (A. 42-43). The Act also provides:

> *If* the Judicial Conference concurs in the determination of the council, . . . it shall so certify and transmit the determination and record of proceedings to the House of Representatives.

28 U.S.C. § 372(c)(8), again with emphasis as added by the panel (A. 44). In the majority's view, "Regardless of what determination, if any, a council has made, the Conference always has the option to refrain from making any determination or from concurring in a council's determination . . ." (A. 44-45. In that view, the

use of the conditional "If" left the Conference "free of any statutory compulsion ever to confront the impeachment issue" (A. 44).

The majority also concluded that, because the Act only conferred an option to certify impeachment determinations to the House, it did not implicate the exclusivity of the constitutional assignment of the impeachment power to the House. In the majority's view, a Conference's determination should be viewed as similar to any other "private informant's suggestion that a judge may have committed an impeachable offense" (A. 46-47).

> Any difference in effect on Congress that a recommendation coming from the Conference and one from a private citizen might have is without constitutional significance, however, for it is beyond doubt that the Conference, like any other individual or group, may inform the Congress when it concludes that a judge may have breached his public trust.

(A. 47).

The majority found it unnecessary, however, to consider the fact that the Conference, unlike other individuals or groups, bases its determinations upon a record compiled through the exercise of the subpoena and other powers conferred by the Act because the decision in *Certain Complaints* had determined the constitutionality of the investigatory and subpoena powers and precluded reconsideration of those issues. (A. 28-29). The panel acknowledged that "an exception [to the issue preclusion doctrine] might be made where the proponent can plausibly show what appellant here claims about the peril of fragmented review" (A. 35). It concluded that Judge Hastings "simply has not made that showing" (*id.*).

The fragment that grants the investigative and subpoena power is, however, inextricably tied to the fragment that es-

tablishes the certification procedure. As the dissenting judge suggested, " . . . we should either address the issue directly or choose a less ingenuous way to avoid reaching the constitutional issue." (A. 84-85) (Buckley, C.J., concurring in part and dissenting in part).

The court below employed similar techniques to avoid resolving the remaining claims that it acknowledge had been left open. Judge Hastings claimed, as he had from the outset and in *Hastings I*, that the Act had made judges dependent for the security of their compensation upon the discretion of their circuit chief judges and councils and had thus assigned judicial officers and agencies an unconstitutional discretion to diminish a judge's compensation in office. The panel did not construe the Act as requiring reimbursement of these expenses. Instead, it rejected the claim as premature, ruling

that Judge Hastings had failed to exhaust administrative remedies that the Act does not specify.[11]

REASONS WHY REVIEW SHOULD BE GRANTED

1. The constitutional questions concerning the validity of the Act and the manner in which it has been implemented and applied are fundamental. Their importance is apparent, and they can only be resolved by the Court. The questions, their importance and the reasons why the Court should resolve them have been developed fully in the petitions counsel that asked the Court to review the decisions in *Certain Complaints* and *Hastings I*, and were anticipated and developed in related contents in those asking the Court to review the decisions *In re Petition to In-*

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11 *Cf. See, e.g., Hastings I*, 770 F.2d at 1104-11 (Edwards, J., concurring)., J. Browning, *et al., Illustrative Rules Governing Complaints of Judicial Misconduct*, 43, 45 (Fed. Jud. Center 1986) [Rule 14(h) and related commentary].

spect and Copy Grand Jury Material (Hastings), and *United States v. Hastings*.[12] Their importance was eloquently summarized in Judge Edwards's concurring opinion in *Hastings I*, 770 F.2d at 1104-11, and the anomaly resulting from their fragmentary disposition is illustrated by Judge Buckley's partial dissent below (A. 78-85). Those points will not be further developed here. There are additional points, however that bear upon the Court's decision to grant or deny review in this case. Those points could not be effectively developed before. They are developed below.

2. There are significant political reasons why any court might prefer not to take responsibility for adjudicating the facial validity of the Act. The legislative history makes it clear that the pro-

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12 See notes 2, 3, 5, and 6, *supra* (for citations).

posals for judicial conduct legislation were scrutinized by the Judicial Conference. The Conference lobbied for the Act in its present form as preferable to the bill that had been adopted by the Senate. There was, and remains, a political concern that if the judiciary will not acquiesce in legislation that assigns responsibility for policing judicial conduct to the judiciary, the House and Senate may seek a constitutional amendment or might streamline their procedures to make the impeachment process less cumbersome and more threatening to judicial independence. In one view, the judiciary's senior officials lobbied for the best political compromise possible. In that view, it would be presumptuous for any court to repudiate their efforts on the ground that the resulting legislation was unconstitutional. It might also be politically dangerous to repudiate the Act, given the current mood

of Congress and perhaps of the citizenry. Moreover, adjudication on the merits presents a "no-win" political dilemma. As the Justices must know, the Act is not popular with district judges who are its primary objects. It has significantly expanded the powers of the chiefs in an era that has already seen the independence of district judges burdened by the demands of the expanding and increasingly complex bureaucracy that has evolved within the judiciary.

These political considerations are further enhanced by the standing and present status of the judge who seeks relief in this case within the judicial community. The judge seeking adjudication in this case is not one of the deans of the federal bench; his judicial work is largely unknown outside his own district and circuit. He has been continuously under attack since shortly after his ap-

pointment. He has been indicted and prosecuted by the executive. He has been tried before his own court. He has been investigated and recommended for impeachment by the judges of his own circuit. The Judicial Conference has concurred in that determination and certified the matter to the House . In response, the House has initiated an aggressive impeachment inquiry. For seven years, Judge Hastings has challenged the establishment and the manner in which it exercised claimed powers rather than quietly departing the judicial stage. The resulting publicity has not been uniformly favorable to the courts. Surely, there must be temptations for any court to take a "pass" in this case rather than reward Judge Hastings's persistence with "the" adjudication on the merits.

Counsel for petitioner were not privy to the deliberations or thinking that led

to the decisions in the present appeal or in *Hastings I*. They had read Judge Edwards's eloquent opinion, styled a concurrence, in *Hastings I*, 770 F.2d at 1104-11, and had concluded that the judges of the court of appeals were aware of and understood the principled constitutional questions that must be resolved. They had observed that court's prompt retreat from the application of ripeness and administrative exhaustion doctrine applied in *Hastings I* in it subsequent decisions in *National Federation of Federal Employees v. Weinberger*, 818 F.2d 935 (D.C. Cir. 1987) and *Ticor Title Insurance Company v. FTC*, 814 F.2d 731 (D.C.Cir. 1987). They studied that court's opinion, but found it impossible to reconcile the manipulation of avoidance doctrine with established jurisprudence. Against that background, they have been unable to account for the decision below or prior *Hastings* decisions

without concluding that unacknowledged political considerations such as those identified above ultimately controlled the result.

The present petition is premised in significant measure upon that conclusion. It asks the Court to review the decision below and to assume responsibility for finally adjudicating the merits of the claims raised in order to eliminate a situation that has cast the lower courts in the uncomfortable role of confronting the intrabranch disputes that proceedings under the Act must generate.

3. There is further aspect of the situation that the court should consider in deciding whether review should be granted. Judge Hastings was acquitted in 1983. For almost five years, he has continued to vigorously defend his office in every forum he thought feasible. In so doing, he has absorbed the psychological

and economic burdens incident to the fight. Throughout those five years, Judge Hastings has had the option to terminate the burdens and end the fight: He could have resigned and returned to private practice and to an active public and political life. Why has he continued the fight?

It should not be apparent that Judge Hastings has not continued the fight so that he could hang on to a $90,000-a-year job. The liabilities he has incurred are such that his compensation would not pay the interest that would accrue if his counsel billed him for their services. The costs alone have been substantial and have diminished that compensation. The prestige is nice and the work is challenging; but Judge Hastings has hardly been able to enjoy the former, and the latter can be found elsewhere in substantial measure. Why has he persisted?

There are two possibilities, and they are not mutually exclusive. Consider the possibility that he was, in the first instance and as he claimed, the innocent victim of William Borders's "rainmaking" scam and is, in the second instance and as he has alleged, the victim of the most oppressive exercise of power that embarrassed executive and judicial establishment officials were able to marshall. The record from which those possibilities might be assessed is now part of the public record. In January 1987, Judge Hastings submitted counsel's analysis of the secret evidence and proceedings to the House and released it to the public. *See* Anderson, *A Provisional and Preliminary Report on the Proceedings Against United States District Judge Alcee L. Hastings: 1981-1986* (Jan. 16, 1987). The House has now released the report compiled by the Investigating Committee. *See Report and*

Recommendations of the Investigating Committee to the Judicial Council of the Eleventh Circuit (Aug. 4, 1986) (released pursuant to House resolution on October 7, 1987). One conservative commentator has studied both and concluded that Judge Hastings is indeed the victim. See James J. Kilpatrick, "A Bum Rap for Judge Hastings", *The Washington Post*, Feb. 25, 1987, at A23 (after release of the *Provisional and Preliminary Report*) and "Hastings Getting Raw Deal," *The Tampa Tribune*, Nov. 2, 1987, at 11A (after reading *The Report and Recommendations of the Investigating Committee*).

There is a further possibility the Court should consider -- the possibility that Judge Hastings has placed constitutional duty above personal interest throughout and has acted to defend his office from what he perceives as unconstitutional encroachment. That possibility,

and perhaps only that possibility, can explain his persistence in pursuing the litigation described in the panel's opinion and reflected in the records of this court.

Counsel acknowledge that such considerations are unlikely to be articulated or acknowledged in any opinions the Court might adopt. In a purist view, those considerations should be as irrelevant to the case at hand as should the political considerations described above. This is not a purist world, however, and if factors such as these are to be considered at all, the consideration should include those on both sides of the balance.

4. The importance of the issues presented by this petition stems from two factors -- one obvious, the other less so. The obvious import stems from the nature of the case. This is an action by a federal judge seeking a declaratory judgment

to determine whether a 1980 statute adopted to regulate conduct of federal judges is, or has been applied in a manner that is, consistent with a 200-year old Constitution adopted to maintain the proper separation and limitations of federal power and to establish federal courts whose judges had sufficient independence to maintain the system. The less obvious factor stems from the manner in which the lower courts have manipulated avoidance doctrine and avoid confronting the central questions presented. In the view of petitioner and his counsel, the courts have so far departed from basic principles of jurisprudence that have long been accepted as necessary conditions to sound judicial decision making as to call for the exercise of the Court's supervisory power in the present case.

Those basic principles may be simply summarized. The fabric of the law is

never complete: The existing fabric defined by established strands of doctrine and precedent ordinarily leaves ample leeway for the exercise of judicial discretion by the judges before whom the new case comes for decision. The constraints on that discretion are of two kinds. Established doctrine and principle define limits, and departures that go beyond those limits are illegitimate unless they are acknowledged and explained. Moreover, there are known techniques that are regarded as legitimate for manipulating the strands of doctrine and precedent within the leeway available to achieve the desired result. A result that falls within the leeway permitted by precedent and principle and that has been achieved by the use of accepted techniques represents a legitimate exercise of the judicial power and discretion, no matter what the views of the losing party. The fabric of

the law may have been modified, but neither the nature of the cloth nor the integrity of the weavers will have been undermined. Decisions that do not satisfy these conditions are not legitimate decisions. Such decisions undermine the integrity of the fabric and of its weavers.

Petitioner submits that the Court should grant review in this case because the decision below and those that preceded it are inconsistent with established constraints and have undermined and will un-

dermine the integrity of the courts so long as the questions presented here remain unresolved.

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87-1187

No. 87-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

THE HONORABLE ALCEE L. HASTINGS,
UNITED STATES DISTRICT JUDGE,

Petitioner,

v.

THE JUDICIAL CONFERENCE OF THE UNITED STATES, et al.,

Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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January 13, 1988

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-5588

ALCEE L. HASTINGS, HONORABLE,
U.S. DISTRICT JUDGE,
U.S. DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF FLORIDA, APPELLANT

v.

JUDICIAL CONFERENCE OF THE U.S., et al.

Appeal from the United States District
Court for the District of Columbia

(D.C. Civil Action No. 86-2353)

Argued May 8, 1987

Decided September 15, 1987

Terence J. Anderson, with whom *John W. Karr, William G. McLain*, and *Robert S. Catz* were on the brief, for appellant.

Brook Hedge, Attorney, U.S. Department of Justice, with whom *Richard K. Willard*, Assistant Attorney General, *Joseph E. diGenova*, United States Attor-

ney, and *Harold Krent*, Attorney, U.S. Department of Justice, were on the brief, for appellees Judicial Conference of the United States, et al.

John Doar for appellees Judicial Council of the Eleventh Circuit, et al.

Before RUTH B. GINSBURG, BUCKLEY, and D.H. GINSBURG, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* D.H. GINSBURG.

Opinion concurring in part and dissenting in part filed by *Circuit Judge* BUCKLEY.

D.H. GINSBURG, *Circuit Judge*: Two years ago, this court held that United States District Judge Alcee L. Hastings' challenges to the constitutionality of the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 ("the Act"),[1] were premature, and instructed the

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1 28 U.S.C. §§ 331, 332, 372(c), 604 (1982).

lower court to dismiss the action without prejudice. When that action was filed, the committee appointed by the Chief Judge of the Eleventh Circuit to investigate the complaint lodged against Judge Hastings under the Act ("the Investigating Committee") had not yet reported its conclusions and recommendations to the Judicial Council of the Eleventh Circuit ("the Council"); we held that the possible outcomes of the investigation were too numerous, and the actual outcome too uncertain, to justify judicial intervention at that stage in the proceedings.[2]

Since that time, the Investigating Committee has delivered its findings and recommendations to the Council, prompting Judge Hastings to renew his attack on the constitutionality of the Act. In addition, during the pendency of this appeal,

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2 *Hastings v. Judicial Conference of United States*, 770 F.2d 1093 (D.C. Cir. 1985) (*"Hastings I"*).

the Council determined that Judge Hastings may have committed impeachable offenses and, as contemplated by the Act in such circumstances, it certified this finding to the Judicial Conference of the United States ("the Conference"). The Conference has concurred in the Council's assessment that the consideration of impeachment may be warranted and in turn certified this determination to the House of Representatives.

Judge Hastings filed the instant action for injunctive relief on August 25, 1986, a few weeks after the Investigating Committee transmitted its report and recommendations to the Judicial Council.[3]

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3 The defendants named in the action were the Judicial Conference of the United States; the Chief Justice of the United States; the Judicial Conference's Committee to Review Circuit Council Conduct and Disability Orders; the Judicial Council of the Eleventh Circuit; John C. Godbold, Chief Judge, and Gerald Bard Tjoflat and Frank M. Johnson, Jr., United States Circuit Judges, United States Court of Appeals for the Eleventh Circuit; Sam C.

His complaint contained two counts. Count One alleged that the Act, on its face, violates the separation-of-powers principles of the Constitution and the Due Process Clause of the Fifth Amendment; Count Two alleged that the Council's (and the Conference's expected) application of the Act to Judge Hastings violated the same constitutional principles and worked a violation of the Compensation Clause of Article III of the Constitution.

In a brief unpublished opinion, the district court held that Judge Hastings' claims concerning procedures before the Conference were not then ripe, and that all but one of his additional constitutional claims were barred by final rulings in one or more cases in which Judge Hast-

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Pointer, Jr., Chief Judge, United States District Court for the Northern District of Alabama; and William C. O'Kelley, United States District Judge, United States District Court for the Northern District of Georgia.

ings participated and had an opportunity to raise the claims.[4] The single constitutional claim that the court held properly presented for decision was the contention that Congress may not compel the Conference to certify to the House of Representatives its own or a council's determination with respect to a judge that -- in the words of the Act -- "consideration

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4 *See Hastings v. Judicial Conference*, No. 86-2353, slip op. at 4 (D.D.C. Sept. 12, 1986), *citing* (1) *Williams v. Mercer*, 610 F. Supp. 169 (S.D. Fla. 1985), *aff'd in part and rev'd in part on other grounds, In the Matter of Certain Complaints Under Investigation by an Investigating Committee of the Judicial Council of the Eleventh Circuit*, 783 F.2d 1488 (11th Cir. 1986) (*"Hastings II"*), *cert. denied sub nom. Hastings v. Godbold*, 106 S. Ct. 3273 (1986); (2) *Hastings v. Judicial Conference of the United States*, 593 F. Supp. 1371 (D.D.C. 1984), *aff'd in part and vacated in part*, 770 F.2d 1093 (D.C. Cir. 1985) (*"Hastings I"*), *cert. denied*, 106 S. Ct. 3272 (1986); (3) *In re Petition to Inspect and Copy Grand Jury Materials*, 576 F. Supp. 1275 (S.D. Fla. 1983), *aff'd* 735 F.2d 1261 (11th Cir. 1984), *cert. denied sub nom. Hastings v. Investigating Committee for the Judicial Council of the Eleventh Circuit*, 105 S. Ct. 254 (1984).

of impeachment may be warranted."[5] The district court found this claim to be without merit, however, because "[a]ny certification of the Council or the Conference is merely informational, nothing more, to be granted only such weight as Congress in its wisdom wishes."[6]

In this appeal, Judge Hastings renews his challenge to the constitutionality of the Act on its face and as applied, and disputes whether any issues he presents are or should be precluded by prior judicial decisions. First, the appellant asserts that the scheme established by the Act is "unconstitutional in principle"[7] because it improperly assigns executive and legislative functions to certain Article III judges and, in the course thereof, compromises the independence of all Arti-

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5 28 U.S.C. § 372(c) (8).

6 *Hastings v. Judicial Conference*, No. 86-2353, slip op. at 5 (D.D.C. Sept. 12, 1986); Appellant's Appendix at 182.

7 Brief for Appellant at 21.

cle III judges. It is by no means clear whether the appellant intends for this general indictment of the Act to be treated as a distinct claim on appeal, or only as background to his more specific claims; we give him the benefit of the doubt, however, and treat the argument as raising a separate claim. Second, he maintains that the Act's certification requirements[8] violate separation-of-powers principles and compromise judicial independence. Third, the appellant argues that the Chief Judge of the Eleventh Circuit has effectively diminished Judge Hastings' compensation in office, in contravention of Article III, by exercising his discretion to initiate an investigation, thus requiring appellant to bear the cost of defending himself. Fourth, Judge Hastings makes certain facial attacks on the Act based on the Due Process Clause.

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8 28 U.S.C. §§ 372(c)(7)(B) and (c)(8).

Specifically, he alleges that the Act fails to provide fair procedures, and that it is unconstitutionally vague and overbroad. Finally, the appellant argues that the Act has been applied to him in an unconstitutional manner, again in violation of separation-of-powers principles, the Compensation Clause, and the Due Process Clause.

For the reasons stated below, we hold that the appellant was properly estopped from raising his claims that the investigatory and subpoena powers of the Investigating Committee and the Council violate the separation of powers and derogate from judicial independence. In view of recent developments, we do not agree with the district court that the issues sought to be raised as to procedures before the Conference are unripe. In addition, we disagree with the district court's conclusion that the remaining issues are precluded.

With respect to appellant's challenge to the certification provisions of the Act, we affirm the district court because we interpret the duty placed on the Conference to be discretionary rather than mandatory, thus blunting any concern with its effect on the separation of powers. The Compensation Clause claim was not decided in previous litigation, but is not properly before us because the appellant did not exhaust his administrative remedies.[9] The facial challenge to the Act on due process grounds is not precluded, but lacks merit. Finally, the claims alleging a denial of due process in the investigation as it unfolded must be revisited by

9 The district court failed to address the Compensation Clause issue, perhaps because the appellant raised the claim in his complaint only obliquely, and did not address it at all in his motion for a temporary restraining order, his motion for a preliminary injunction, or at oral argument before the district court. We overlook these omissions, however, only to note the bar of non-exhaustion.

the district court in order to consider whether the objections were raised during the investigative proceedings and exhausted, and if so to resolve them on the merits.

I. BACKGROUND[10]

A. *Developments Through Hastings I*

Appellant was indicted on December 29, 1981, by a federal grand jury for conspiracy to solicit and accept money in return for performing certain official actions in his capacity as a federal judge. The indictment also alleged that Judge Hastings revealed to his co-conspirator, William Borders, the content and expected issuance date of a judicial order that he was preparing. According to the indictment, Borders relayed this information to

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10 The structure and operation of the Act, as set forth concisely in our opinion in *Hastings I*, 770 F.2d at 1095-96, is reprinted for the convenience of the reader as an appendix to this opinion.

an undercover agent posing as a defendant in a case pending before Judge Hastings.

Judge Hastings moved to quash the indictment on the ground that impeachment by Congress is the sole means of punishing a federal judge for high crimes and misdemeanors. The motion was denied. Meanwhile, the trial of the alleged co-conspirator, Borders, was severed, he was convicted of several counts of conspiracy, and his conviction was upheld on appeal.[11] On February 4, 1983, however, Judge Hastings was acquitted of all the charges brought against him.

On March 17, 1983, two district court judges filed a complaint with the Judicial Council of the Eleventh Circuit against Judge Hastings, pursuant to 28 U.S.C. § 372(c), alleging that he had engaged in conduct prejudicial to the effective and

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11 *United States v. Borders*, 693 F.2d 1318 (11th Cir. 1982), *cert. denied*, 461 U.S. 905 (1983).

expeditious administration of the business of the courts and had violated several canons of the Code of Judicial Conduct for United States Judges. Specifically, the complaint charged in substance that Judge Hastings had actually committed the crime of which he had recently been acquitted; that is, it alleged that he had conspired to obtain a bribe in return for the performance of a judicial act. The complaint also contained other allegations concerning conduct and statements by Judge Hastings in the course of the criminal proceedings against him.[12] On March 29,

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12 In addition to the bribery allegation, the complaining judges charged that, in violation of the Code of Judicial Conduct:

> (2) Judge Hastings made "public and unfounded statements" that the United States was prosecuting him on racial/political grounds; (3) Judge Hastings knowingly and publicly exploited his judicial position or acquiesced in such exploitation by others acting on his behalf by accepting financial donations from lawyers and other members of the public to defray the costs of his

1983, Chief Judge John C. Godbold of the Eleventh Circuit appointed a committee to investigate the complaint, pursuant to 28 U.S.C. § 372(c)(4). The Investigating Committee consisted of himself, two circuit judges, and two district judges. On June 3, 1983, the Investigating Committee filed a petition in the Southern District of Florida for access to the files of the

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criminal defense; (4) Judge Hastings, by his own testimony, had allowed *ex parte* contacts between his law clerk and counsel in pending cases concerning substantive issues in those cases and concerning the content of orders and opinions not yet entered, and had "completely abdicated and delegated" his judicial decision-making authority to his law clerk; (5) Judge Hastings, by his own testimony had told counsel in a judicial proceeding that he had read an important precedent when he knew he had not and explained his deception by implying that it was common for judges to make such deliberate misstatements; (6) Judge Hastings, by his own testimony, had exploited his judicial position by soliciting funds for someone he knew was a convicted federal offender.

Hastings I, 593 F. Supp. 1371, 1376-77 (D.D.C. 1984).

grand jury that had indicted Judge Hastings. The court granted the petition over Judge Hastings' objection that the investigation was part of a conspiracy to deprive him of his constitutional rights. That decision was affirmed by the Eleventh Circuit, which held that the Act barred district court review of Judge Hastings' conspiracy claims,[13] and remitted him exclusively to review by the Judicial Conference, under the procedures of the Act, "in a challenge to the actions, if any, taken by the Judicial Council."[14]

Judge Hastings brought an action in the United States District Court for the District of Columbia (*Hastings I*), approximately six months after the Investigating Committee began its work, to enjoin the Eleventh Circuit proceedings against him and to declare the Act unconstitutional.

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13 28 U.S.C. § 372(c)(10).
14 *Petition To Inspect*, 735 F.2d 1261, 1275.

The complaint alleged that the Act, both on its face and as applied, violated the separation-of-powers principles of the Constitution and the Due Process Clause of the Fifth Amendment. The Complaint also alleged that several Eleventh Circuit judges conspired to violate the Judge's constitutional rights, and that his rights under the Privacy Act had been violated.

The district court dismissed the action[15] and we affirmed its order, but for reasons different than those offered by the district court.[16] We held that, at the time the district court rendered its decision, adjudication of the constitutional challenges to the Act, both on its face and as applied, was premature. We also held that the appellant had had a full and fair opportunity to litigate the conspiracy claim in *Petition to Inspect*,[17]

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15 *Hastings I*, 593 F. Supp. 1371.
16 770 F.2d 2093 (1985).
17 735 F.2d at 1275 & n.10.

and that, accordingly, the Eleventh Circuit's holding that such matters were committed to the exclusive review of the Judicial Conference was binding on the appellant "for all future litigation between himself and the [investigative] committee over matters related to this investigation."[18] We expressly declined, however, to adopt the Eleventh Circuit's view of the reviewability of Judge Hastings' conspiracy claims as our own, or to "express [any] view ourselves on that issue."[19] Finally, we found that the "disclosures by Justice Department officials to the Investigative Committee concerning the criminal proceedings against Judge Hastings were proper as a 'routine use' under the Privacy Act. . . ."[20]

B. *Developments Since Hastings I*

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18 770 F.2d at 1103.
19 *Id.*
20 *Id.* at 1104.

Since his previous appeal was before us, the procedure prescribed by 28 U.S.C. § 372(c) has been completed. The inquiry into Judge Hastings' conduct has progressed from the Investigating Committee to the Council and on to the Conference, which determined that the appellant has engaged in conduct that may warrant impeachment, and so certified to the House of Representatives. In addition, the Eleventh Circuit has decided another lawsuit stemming from the investigation of Judge Hastings (*Hastings II*).[21] That case involved an attempt by Judge Hastings and his former and present office staff to enjoin the enforcement of subpoenas issued by the Investigating Committee, and, consolidated with the Judge's appeal, original proceedings brought by the Committee to enforce the subpoenas. These recent

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21 783 F.2d 1488 (11th Cir. 1986).

factual and legal developments are crucial to the disposition of this appeal.

1. *Certification to the House*

On August 4, 1986, just days before we issued our decision in *Hastings I*, the Council notified Judge Hastings that it had received the report of the Investigating Committee.[22] The Committee recommended that the Council certify to the Conference that consideration of impeachment may be warranted. On September 2, 1986, the Council filed its report with the Conference, pursuant to 28 U.S.C. § 372(c)(7)(B). The Council concluded from its investigation that Judge Hastings

> has engaged in conduct which might constitute one or more grounds for impeachment under Article I of the Constitution, in that: (a) in an effort to avoid conviction on the

22 Shortly thereafter, the appellant filed this lawsuit.

> charge of conspiracy to solicit and accept a bribe in exchange for a judicial act Judge Hastings engaged in obstruction of justice . . .; and (b) Judge Hastings did in fact engage in such conspiracy.[23]

The Council's determination was sent to the members of the Conference on September 4, 1986, together with the report of the Investigating Committee and related materials. On March 17, 1987, the Conference certified to the House of Representatives its concurrence in the Council's determination that consideration of Judge Hastings' impeachment may be warranted.[24]

2. *Hastings II*

In May 1985, while the appeal in *Hastings I* was *sub judice* in this court, the Investigating Committee directed that

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23 Certification of the Judicial Council of the Eleventh Circuit In the Matter of Certain Complaints Against United States District Judge Alcee L. Hastings.

24 Defendant-Appellees' Appendix at 142.

subpoenas be issued and served on Judge Hastings' secretary, Betty Ann Williams, and on three of the judge's then-present or former law clerks. The subpoenas directed each to appear before the Committee on a specified date and directed Ms. Williams to produce appointment diaries and the like from Judge Hastings' chambers. The subpoenaed parties either failed to appear before the Committee on the appointed date, or appeared and refused to testify about communications between Hastings and his staff on grounds of privilege. In response, the Committee filed separate motions with the Eleventh Circuit for enforcement of the subpoenas and for orders directing the staff members to testify as to all pertinent matters.

On May 20, 1985, Ms. Williams and Mr. Erlich, one of the subpoenaed law clerks, brought an action in the United States District Court for the Southern District

of Florida against the Investigating Committee and the clerk of the Court of Appeals for the Eleventh Circuit. The plaintiffs sought to quash the subpoenas principally by demonstrating that the subpoena power conferred on the Committee by the Act was invalid. The district court dismissed the complaint for lack of subject matter jurisdiction on the ground that the court of appeals, which issued the subpoena, is the appropriate forum in which to challenge subpoenas issued under the Act.[25] The court also held, in the alternative, that the complaint was without merit and that the subpoenas were lawful. Plaintiffs appealed.

Although Judge Hastings was a party to the appeal from the district court, he expressly declined to press the constitutional claims raised below. A special

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25 *Williams v. Mercer*, 610 F. Supp. 169 (S.D. Fla. 1985).

panel of the Eleventh Circuit, which consisted of three circuit judges from other circuits, affirmed the district court's dismissal on the jurisdictional grounds stated,[26] and went on to consider the original enforcement action brought by the Committee. Judge Hastings was not a party to the subpoena enforcement proceedings; his motion to intervene in that proceeding was denied by the Court of Appeals as untimely filed.[27] Nevertheless, the court found that the subpoenaed witnesses had standing to raise certain constitutional objections to those portions of the Act relating to the validity of the on-going investigation of Judge Hastings.

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26 *Hastings II*, 783 F.2d 1488, 1494-99.

27 The same counsel that represented Judge Hastings in his appeal, however, also represented two members of Judge Hastings' staff who were parties to the enforcement action. *Id.* at 1500.

The Eleventh Circuit summarizes the constitutional claims raised in *Hastings II* as follows:

> "(1) The Act impermissibly assigns executive powers, including the subpoena power, to judicial officers.
>
> (2) The investigatory scheme established by the Act unconstitutionally intrudes upon the independence of sitting Article III judges to engage in free and uninhibited decisionmaking.
>
> (3) The authority given to the judicial branch to certify that grounds for impeachment may exist is inconsistent with the sole power of the House of Representatives to initiate impeachment proceedings.
>
> (4) The Act's standards of judicial misconduct are unconstitutionally vague and overbroad.

(5) The Act violates the due process rights of judges under investigation in that it denies the accused judge the right to confront the evidence against him and impermissibly combines investigatory/ prosecutorial and adjudicatory functions in the judicial council."[28]

The court rejected the first, second, and third claims on their merits. It held that the appellant staff members were without standing to raise the fourth claim, and that it was unnecessary to reach the fifth claim in order to decide the validity of the Committee's investigatory and subpoena powers. Certain other constitutional and technical objections to the subpoena were raised by the appellants, including the claim of a privilege protecting communications among Judge Hastings and members of his staff, but the

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28 *Id.* at 1502.

subpoenas were held enforceable notwithstanding these.[29]

II. DISCUSSION

A. *Issue Preclusion*

Judge Hastings argues that neither the Eleventh Circuit's decision in *Hastings II*, nor any other prior case, prevents this court from making an independent decision on the merits of each constitutional claim he raises in this appeal.

At the outset we note the general rule of issue preclusion: "[W]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim."[30] To the extent that any con-

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29 *Id.* at 1514-25.

30 Restatement (Second) of Judgments § 27 (1982) cited with approval in *National*

stitutional issues are precluded in this case, the bar is *Hastings II*. Insofar as relevant here, *Petition to Inspect* involved only the Investigating Committee's access to grand jury materials and the proper forum for presentation of appellant's conspiracy theory, and *Hastings I* held only that questions concerning the Act's constitutionality were not then ripe for review.

As noted earlier, the district court in the instant case reached the merits only with respect to Judge Hastings' claim that the certification provisions of the Act are unconstitutional. The court held, somewhat cryptically, that all of his other claims were barred by rulings in "one or more" of the cases in which the appellant participated and which the court

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Treasury Employees Union v. Internal Revenue Service, 765 F.2d 1174, 1176 (D.C. Cir. 1985) (emphasis omitted); *see Montana v. United States*, 440 U.S. 147, 153 (1979).

cited. The court neither identified the precluded claims nor attempted to match each claim to be barred by collateral estoppel with the case in which the issues necessary for its resolution had been decided adversely to the appellant.

As the appellees apparently concede, albeit grudgingly,[31] the preclusive effect of prior decisions is far narrower than the district court suggested. Indeed, the only claims precluded are those that challenge the constitutionality of conferring investigatory power on Article III judges.[32] In *Hastings II*, the Eleventh

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31 Brief for Judicial Conference at 23-24.

32 Judge Hastings makes the related separation-of-powers claim here that the mechanism prescribed by the Act makes "legislative commissioners" of judges, since their investigations of complaints are conducted with an eye toward certifying to the House of Representatives whether a judge's conduct may warrant consideration of impeachment. This claim has not been previously decided in litigation in which Judge Hastings was a participant; nevertheless, we find the claim meritless

Circuit upheld the constitutionality of the investigatory and subpoena powers of the Investigating Committee and of the Council, over Judge Hastings' objection that these powers are executive and, therefore, cannot be vested in the Judicial Branch of government consistent with separation-of-powers principles.[33] In addition, *Hastings II* rejected the appellant's claims that the judicial complaint procedure unconstitutionally intrudes upon the independence of the judge under investigation.[34] Thus, what we have styled as Judge Hastings' first claim on appeal,[35] is precluded by the Eleventh Circuit's decision in *Hastings II*.[36]

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for the reasons given in our discussion of the certification issue.

33 783 F.2d at 1503-06.

34 *Id.* at 1506-10.

35 *See supra* at 4.

36 While the Eleventh Circuit in *Hastings II* addressed itself in terms primarily to the lawfulness of the Investigating Committee's authority, neither its reasoning nor its conclusion left open the possibility of now separately attacking the

investigative authority vested in the Council. The court found it necessary to consider the role of the Council in reaching the conclusion that the Act does not impermissibly assign executive powers to the judges serving on the Investigating Committee. The court observed:

> "After the investigation is complete, the judicial council
>
> > shall take such action as is appropriate to assure the effective and expeditious administration of the business of the courts within the circuit, including, but not limited to, any of the following actions. . . .
>
> 28 U.S.C. § 372(c)(6)(B).
>
> Thus, unlike the President's Commission on Organized Crime, which recommended law enforcement legislation and also various executive measures to the President and Attorney General, the investigating judges here are concerned solely with matters affecting the management and reputation of the judiciary itself.
>
> We know of no authority for the proposition that court's administrative and investigatory activities, limited to consideration of their own conduct and efficiency, are to be labelled as 'executive' simply because non-adjudicative in character."

783 F.2d at 1504 (footnote omitted). Later, the court stated:

> 'The critical point is that the investigatory tasks at issue here, including the subpoena power, have the sole purpose of exploring complaints against federal judges and magistrates, with the ultimate aim of promoting 'the effective and expeditious

> administration of the business of the courts.' Functions so limited in scope and purpose may or may not be constitutional in other respects, but they do not fall outside the ambit of duties assignable to members of the judicial rather than of another branch."

Id. at 1505. Reflecting back on these passages, the court later remarked that "we have determined that a judicial council may constitutionally conduct an investigation . . . ." *Id.* at 1510.

As to the argument concerning judicial independence, the Eleventh Circuit stated:

> "The Act also expressly allows a judicial council, upon determining that a judge has engaged in conduct constituting one or more grounds for impeachment, to certify this determination to the Judicial Conference for eventual presentation to the House of Representatives. . . . [W]e uphold the constitutionality of this authority, and find that it does not "chill" a judge's independence any more than does existence of the impeachment power itself. Like the other sanctions we have discussed, this power, also, does not, in our view, impinge upon the protected independence of judges."

Id. at 1509. Although we have elsewhere noted that the Eleventh Circuit's consideration of the constitutionality of the Conference's possible certification to the House that impeachment may be warranted was not essential to its holding, the same may not be said of that court's consideration of the Council's power of certification to the Conference. We do not regard

Although *Hastings II* also rejected the claim that the certification provisions of the Act intrude upon the executive power of the House to initiate impeachment proceedings,[37] the district court was correct in reaching the merits of the certification issue. For, passing whether the Eleventh Circuit's conclusions were correct, it was by no means essential for that court to decide this constitutional issue in order to determine whether the subpoenas were valid. Nor are appel-

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the Eleventh Circuit's conclusions regarding certification by the Conference as necessary because such certification involved several layers of speculation. *Id.* at 1512; *see also id.* at 1510 n.20. It was entirely reasonable, however, for the Eleventh Circuit to feel bound to consider the immediate uses to which the subpoenaed information might be put in deciding whether the subpoena power was lawful. *Id.* at 1510-11.

Of course, because the issue is precluded, we express no judgment on whether the authority that the Act vests in the judicial councils violates separation-of-powers principles or unconstitutionally treads upon the independence of Article III judges.

37 783 F.2d at 1510-12.

lant's Compensation Clause claim or the facial due process challenges precluded by *Hastings II*; the former was not presented and the court declined to reach the latter because even "[i]f Judge Hastings' procedural rights are being denied, that does not impair the enforceability of the Committee's subpoenas."[38] Similarly, the due process challenges to the investigation as it unfolded could not be barred, since the complaint against the appellant was still being considered by the Investigating Committee when *Hastings II* was decided.

The appellant does not really deny that his broad claims relating to the constitutionality of the investigatory process prescribed by the Act were decided in *Hastings II*; instead, he offers a number of reasons why he should not be precluded from re-presenting them in this litigation. First, appellant states that "[t]he

38 *Id.* at 1514.

legal context in which [he] asserts his claims here differs substantially from the context that prevailed when the special panel [in *Hastings II*] considered claims that were significantly unrelated," and that preclusion would result in an "inequitable administration of laws."[39] Judge Hastings adduces no further support for this vague and conclusory claim, and we find it entirely unpersuasive.

Second, the appellant argues that a determination of the validity of the Act as a whole in a single action is warranted, because a fragmented analysis obscures the fact that the whole of the Act is, in essence, more unconstitutional than the sum of its parts. Although initially intriguing, this argument is ultimately unconvincing. What appellant calls "fragmentary analysis" of legislation is

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39 Brief for Appellant at 26, *citing* Restatement (Second) of Judgments § 28(2) (1982).

in fact the norm in our judicial system; courts are empowered to rule on the constitutionality of only those portions of a statute that are ripe for review. Once a court has done so, the same issues may not be relitigated by the same parties. While an exception might be made where the proponent can plausibly show what appellant here claims about the peril of fragmented review, he simply has not made that showing. Try as we have, we see here no more than an unsuccessful litigant understandably seeking a second chance. We understand but we cannot accommodate.

Finally, the appellant claims that he was denied an adequate opportunity to obtain full and fair adjudication in *Hastings II* because: (1) it was improper for the Chief Justice, who is also chairman of the Conference, to select judges to sit on the special panel designated to decide *Hastings II*, inasmuch as he was an appel-

lant in that action; and (2) the appellant was not a party to the original subpoena enforcement action. We reject the first assertion, since the appellant has produced no evidence whatsoever suggesting that the special panel, its method of selection, or its decision was, might have been, or even gave the appearance of being, anything less than fair and impartial. The purely theoretical possibility of bias in the selection does not render the application of the special panel's decision "unfair" to the appellant.

We also find that Judge Hastings cannot avoid the preclusive effect of *Hastings II* by pointing to his non-party status as to the subpoena enforcement action, since his role in that action was significant. A non-party who "controls or substantially participates in the control of the presentation on behalf of a party is bound by the determination of issues de-

cided as though he were a party."[40] There is ample evidence that Judge Hastings exercised substantial control over the defense of the subpoena enforcement action. First, although his motion to intervene was denied as untimely, his attorney, who prepared that motion, represented two members of Judge Hastings' staff in the enforcement action. Second, Judge Hastings assumed the role of lead petitioner in the petition for certiorari to review *Hastings II*. Finally, the special panel in *Hastings II* held that the subpoenaed witnesses "arguably possess a kind of surrogate standing [to raise certain constitutional challenges to the Act], derived from Judge Hastings' judicial privilege upon which their enforced testimony may impinge."[41]

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40 Restatement (Second) of Judgments § 39 (1982). *See Montana v. United States*, 440 U.S. 147, 154 (1979); *Schnell v. Peter Eckrich & Sons, Inc.*, 365 U.S. 260, 262 n.4 (1961); *Souffront v. Compagnie des Sucreries*, 217 U.S. 475, 486-87 (1910).

41 783 F.2d at 1501.

In allowing them to raise those issues the court further noted that the appellant "undoubtedly supports these witnesses' refusal to testify; he may well have requested them to take that position on his behalf."[42] With such a strong interest in the outcome, his intimate and supervisory relationship to the parties who were on his staff, and the role of his own lawyer in the litigation, it is apparent that the appellant was less than a party to the enforcement action in name only.

B. *Certification*

If, after receiving an investigating committee's report, a judicial council determines that a judge has "engaged in conduct which might constitute . . . grounds for impeachment under article I of the Constitution," the council "shall promptly certify such determination, together with any complaint and a record of any associ-

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42 *Id.*

ated proceedings, to the Judicial Conference of the United States."[43] If, after receiving such certification, the Conference "concurs in the determination of the council, or makes its own determination, that consideration of impeachment may be warranted, it shall so certify and transmit the determination and the record of proceedings to the House of Representatives for whatever action the House of Representatives considers to be necessary."[44]

Judge Hastings contends that, at least when the Council has made the determination specified in section 372(c)(7)(B), the Conference is not merely authorized -- but is required -- by section 372(c)(8) to determine whether a judge has engaged in conduct that may warrant consideration of impeachment by the

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43 28 U.S.C. § 372(c)(7)(B).
44 *Id.* (c)(8).

Congress, and if so, to certify that determination to Congress. We agree that weighty constitutional issues would arise if certification by the Conference to the House were mandatory, because such a scheme would (1) require Article III judges to make a determination that is arguably an exercise of judicial power yet subject to review by another branch of government,[45] or (2) force members of the Judicial Branch to make initial determinations concerning the impeachability of judges, arguably in violation of the Constitution's exclusive assignment of the impeachment power to the Legislative Branch.[46]

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45 *Cf. Hayburn's Case*, 2 U.S. (Dal.) 409 (1792); *United States v. Ferreira*, 54 U.S. (13 How.) 40 (1851).

46 The district court was apparently willing to accept the appellant's characterization of certification as mandatory, but believed that any separation-of-powers problems were solved by the non-binding character of the certification with respect to the Conference: "Because any certification under the Act has only in-

In our view, however, the better reading of the Act is that both determination and therefore certification by both the councils and the Conference, is entirely discretionary. Congress simply provided statutory authority for the inherent right of the Conference, if it so chooses, to advise the House that, in the course of carrying out the Act's primary mission of regulating judicial conduct *short* of impeachable offenses, that a

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formational effect, no further constitutional issue is raised by the mandatory nature of the requirement that the Conference certify to the House of Representatives its determination that impeachment may be warranted." *Hastings v. Judicial Conference*, No. 86-2353, slip op. at 6. The district court's statement, however, does not render the certification provision free from constitutional doubt, for the reason given in the text above. Moreover, so far as we can determine, the appellant has not attempted to portray certification by the Conference as binding on the House; indeed, any such assertion would be puzzling in view of the provision in 28 U.S.C. § 372(c)(8) making it clear that the House may take "whatever action [it] considers to be necessary" in response to certification.

judge may have crossed that line. We reach this conclusion not merely to avoid a reading that might place the constitutionality of the Act in doubt,[47] but because a fair reading of the Act supports this interpretation. Neither the councils nor the Conference is *required* by the terms of the Act to determine whether a judge may have committed an impeachable offense. No one could maintain otherwise.

As to the councils, 28 U.S.C. § 372(c)(7)(B) is implicitly conditional.

> *In any case in which the judicial council determines*, on the basis of a complaint and an investigation under this subsection, or on the basis of information otherwise available to the council, that a judge appointed to hold office during good behavior

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47 *See NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 507 (1979); *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 407-08 (1909).

> has engaged in conduct -- (i) which might constitute one or more grounds for impeachment under article I of the Constitution; . . . *the judicial council shall promptly certify such determination*, together with any complaint and a record of any associated proceedings, to the Judicial Conference of the United States. (Emphasis added).

Nowhere does the Act require a council even to consider whether the judicial misconduct before it may constitute an impeachable offense. A council may simply conduct an investigation, decide whether to take any of the disciplinary actions listed in 28 U.S.C. § 372(c)(6)(B), and go no further. Only when a council does elect -- in its discretion -- to consider the impeachment question, and determines that impeachment may be warranted, must it certify that determination to the Confer-

ence. The determination is discretionary but once made, the communication is mandatory. Because that communication is wholly within the judicial branch, however, it does not even suggest any separation-of-powers problem.

The Conference is also free of any statutory compulsion ever to confront the impeachment issue. The language of 28 U.S.C. § 372(c)(8) is explicitly conditional:

> *If* the Judicial Conference concurs in the determination of the council, or makes its own determination, that consideration of impeachment may be warranted, it shall so certify and transmit the determination and the record of proceedings to the House of Representatives . . . (Emphasis added).

Regardless of what determination, if any, a council has made, the Conference always

has the option to refrain from making any determination or from concurring in a council's determination of whether a judge's misconduct may warrant impeachment; instead, the Conference may choose simply to consider which of the actions described in 28 U.S.C. § 372(c)(6)(B), if any, is appropriate.

In sum, the Act's certification provisions require neither the Conference nor the council to make any certification concerning impeachment; and, even if the Conference exercises its discretion to make a determination that impeachment may be warranted, the requirement that it certify that determination to the House is without independent constitutional significance. Indeed, it should be self-evident that such a scheme is free from constitutional doubt. There is no harm in requiring that any opinion the Conference holds be made public, so long as it does not have to

formulate any opinion at all if it does not choose to do so.

It is to be expected, of course, that Congress would accord the Conference's recommendation the substantial respect it would be due.[48] Congress might equally, however, regard a private informant's suggestion that a judge may have committed an impeachable offense as a matter of the utmost gravity. That would undoubtedly depend upon the informant's reputation for

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48 Judge Hastings also presses anew the argument that certification by the Conference "might substantially alter the political context in which impeachment recommendations are brought before the House from that intended by the Framers -- making it more difficult for the House to decline to impeach in the face of an express recommendation." 783 F.2d at 1512. This argument is unpersuasive, however, in the absence of any indication that, in passing the Act, Congress was attempting to bind itself, or even thought it risked binding itself, by creating a forceful political dynamic. Without such evidence, we are unwilling to indulge our own predictions about the effect of a certification on the politics and priorities of the House. *Cf. Bowsher v. Synar*, 106 S. Ct. 3181, 3191 (1986).

probity and the quality of the information to which he had access. Any difference in the effect on Congress that a recommendation coming from the Conference and one made by a private citizen might have is without constitutional significance, however, for it is beyond doubt that the Conference, like any other individual or group, may inform the Congress when it concludes that a judge may have breached his public trust. Insofar as the Conference reveals that it is concurring in the council's determination, of course, it may place a cloud over the relationship between the Council and the judge the Council has accused, to the detriment of public confidence in his decisions. But that is a reason counselling caution in any Council or Conference decision to take up the question, not a constitutional barrier to their sharing their answer with Congress and the public.

C. *Compensation Clause*

The appellant claims that his compensation in office was diminished in violation of Article III, Section 1 of the Constitution because (1) the Act includes no provision for payment or reimbursement of the costs associated with a judge's defending himself against complaints investigated thereunder; and (2) the Director of the Administrative Office of United States Courts ("the Director"), declining Judge Hastings' request for reimbursement, stated that he has no authority to pay such expenses based solely upon the appellant's request. This unconstitutional situation is exacerbated, according to the appellant, because the Chief Judge of each circuit has unreviewable authority to decide whether to dismiss a complaint or to empanel an investigating committee,[49] thus giving him unchecked power effectively to

49 *See* 28 U.S.C. §§ 372(c)(3), (c)(4).

"diminish" the compensation of federal judges.

We find that Judge Hastings has failed to exhaust the administrative remedies available to him with respect to his Compensation Clause claim. In applying the exhaustion requirement, this court asks whether a party "may be attempting to short circuit the administrative process or whether he has been reasonably diligent in protecting his own interests."[50] When the Director informed Judge Hastings that he lacked authority to make reimbursement *solely upon the Judge's request*, the appellant obviously should have redirected his request for attorney's fees to the Council or to the Conference. Under 28 U.S.C. § 604(h)(1), the Director is required to "pay necessary expenses incurred

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50 *Ticor Title Ins. Co. v. FTC*, 814 F.2d 731, 735 (D.C. Cir. 1987) (opinion of Edwards, J.) (quoting E. Gelhorn & B. Boyer, Administrative Law and Process 316-19 (1981).

by the judicial councils of the circuits and the Judicial Conference under section 372 of this title." Before seeking judicial intervention, Judge Hastings should have given the Council or the Conference a chance to determine whether his attorney's fees were a "necessary expense incurred by" either body. If the Compensation Clause does require that the cost of Judge Hastings' defense be reimbursed, the authorities charged with administration of the Act should at least have an opportunity to construe the Act in a manner that comports with the Constitution.

D. *Due Process Claims -- Facial*

Judge Hastings contends that the Act fails to guarantee the "fundamental fairness" of the proceedings authorized, and that its standards of behavior are so vague and overbroad that it chills the exercise of constitutionally protected rights. As such, he argues, the Act on

its face violates the Due Process Clause of the Fifth Amendment.

The appellant's attack on the fairness of the proceedings consists, at least superficially, of a recasting of his separation-of-powers arguments in terms of the Due Process Clause. We have already held that his claim that the Act requires judges to exercise "executive" (i.e., investigative) functions is precluded by the decision in *Hastings II*. Our holding in this case, see *infra* pp. 31-34, that the statutory standard of judicial conduct is not overbroad and that appellant cannot claim that it is vague likewise forecloses any argument that the Act delegates legislative authority to the judiciary -- an argument that would be most implausible in any event. On the other hand, the deeper substructure of his claim may be that the combination of certain functions in the same deliberative body creates an inherent

risk of bias in their discharge, even if the same body's exercise of any one of those functions, standing alone, would be permissible.

The argument in appellant's brief portrays the due process concern as follows:

> The Act combines the power to enact legislation defining the standard [of conduct for judges], to adopt or revise the rules that will govern proceedings to enforce this legislation, and to exercise (or establish the body which will exercise) the final review power in one body -- the Conference. A majority of that body, the Chief Justice and the chief judges, also hold the executive power to determine which complaints shall be investigated and who shall conduct the investigations (the chief judges) and to determine--who shall exercise

> the power of adjudication on final review (the Chief Justice). Similarly, the Act delegates to each of the reconstituted councils the power to legislate separate procedural rights for judges in different circuits.

Brief for Appellant at 38. On analysis, this claim boils down to an assertion that the Act has authorized an improper combination of investigative and adjudicative functions, since there is no substance to the appellant's charge that members of the Council or of the Conference are exercising legislative power. Judges must interpret and give meaning-in-fact to the standard of conduct articulated in the Act, but that is logically an inseparable part of an adjudicative function. Likewise, experience rather than pure logic teaches that the power to adopt internal rules of procedure is also inherent in the exercise

of adjudicative power by an independent judiciary; if it could not make such rules for itself, then it could not be truly independent.

The combination of investigative and adjudicative powers in an administrative body, the Supreme Court has held, does not, without more, violate the Due Process Clause. *Withrow v. Larkin*, 421 U.S. 35, 46-54 (1975). In *Withrow*, a state administrative board was responsible for investigating charges of misconduct against physicians and then determining whether to impose disciplinary sanctions. The Court rejected the petitioner's facial due process attack, which focused on the combination of these functions:

> The processes utilized by the Board, however, do not in themselves contain an unacceptable risk of bias . . . . No specific foundation has been presented for suspecting that the Board

had been prejudiced by its investigation or would be disabled from hearing and deciding on the basis of the evidence to be presented at the contested hearing. The mere exposure to evidence presented in nonadversary investigative procedures is insufficient in itself to impugn the fairness of the Board members at a later adversary hearing.

Id. at 54-55.[51] The Court also stated in *Withrow* that "[t]he contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication . . . must convince that under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk

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51 *See also Richardson v. Perales*, 402 U.S. 389 (1971); *FTC v. Cement Institute*, 333 U.S. 683 (1948).

of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented."[52] We find no such risk inherent in the procedures established by the Act.

The fact that federal judges administer the mechanism described by the Act contributes in no small measure to this conclusion. They are called upon every day to put aside considerations not legally relevant to their decisions. A judge who can decide a case one way, notwithstanding inadmissible evidence of which he is aware indicating a different result, is not likely to prejudge a fellow judge's cause. If there is risk here, it is the risk that an empathetic decisionmaker poses to the public, not a risk of bias toward the judge against whom a complaint has been lodged.

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52 421 U.S. at 47.

In addition, the appellant argues that the proceedings violate due process because "[t]he Act *does not require* that the accused judge be permitted to confront the evidence against him or even that he be permitted to appear before the adjudicative tribunals . . . ."[53] Section 372 (c)(11) of the Act provides that each Council is to prescribe procedural rules that require, *inter alia*, notice and "an opportunity to appear (in person or by counsel) at proceedings conducted by the investigating panel, to present oral and documentary evidence, to compel the attendance of witnesses or the production of documents, to cross-examine witnesses, and to present argument orally or in writing . . . ." Apparently, Judge Hastings' point is that these rights are not assured after the "investigating panel" stage of the

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53 Brief for Appellant at 37 (emphasis in original).

statutory proceedings. Insofar as the Council or the Conference conducts a further investigation, however, as they are authorized to do, the phrase "investigating panel" may well refer generically to them.

We decline to reach this claim on the merits, however. The appellant may not press a facial due process attack concerning the Act's procedures after the Act has been applied fairly to him. Confronted with an argument not that a judge under investigation will *necessarily* be denied fair procedures, but only that there *may* be such a denial, depending on how those applying the Act construe it, makes no sense for a court to strike down a statute that has in fact been applied in a constitutional manner. Any complaint the appellant has with the procedures outlined in the Act can be taken up in his challenge to the investigation as it unfolded. Sig-

nificantly, however, appellant has not argued that the Act as applied to him violated any due process rights of confrontation or attendance.

The appellant argues next that the substantive statutory standard authorizing sanctions in cases of "conduct prejudicial to the effective and expeditious administration of the business of the courts," 28 U.S.C. § 372(c)(1), is vague and overbroad, and therefore chills judicial independence and exercise by judges of their First Amendment rights. The overbreadth and vagueness doctrines are related but distinct. A vague law denies due process by imposing standards of conduct so indeterminate that it is impossible to ascertain just what will result in sanctions; in contrast, a law that is overbroad may be perfectly clear but impermissibly pur-

port to penalize protected First Amendment activity.[54]

The overbreadth doctrine is an exception to the usual rule of constitutional litigation requiring parties to assert only their own interests and forbidding them from raising challenges to a statute based on the rights of third parties. The exception reflects the sensitivity of the first amendment to the potential "chilling" effect that an overbroad statute may have on the protected speech or expression of persons not before the court.[55] Thus, facial overbreadth attacks have been entertained in cases involving statutes that sought to regulate only spoken words; or threatened rights of association; or by their terms, sought to regulate the time, place, or manner of commu-

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54 *See generally Zwickler v. Koota*, 398 U.S. 241 (1967).

55 *See* G. Gunther, Constitutional Law 1148-57 (1985).

nication; or required approval for expressive conduct under laws that delegate unreviewable discretionary power to local functionaries.[56]

In this case, however, the overbreadth challenge to the Act fails because the Act is directed primarily against judicial misconduct, not against protected First Amendment activity. As the Supreme Court stated in *Broadrick*:

> "It remains a 'matter of no little difficulty' to determine when a law may properly be held void on its face . . . . But the plain import of our cases is, at the very least, that facial overbreadth adjudication is an exception to our traditional rules of practice and that its function, a limited one at the outset, attenuates as the otherwise unprotected behavior

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56 *See Broadrick v. Oklahoma*, 413 U.S. 601, 612-13 (1973).

> that it forbids the State to sanction moves from 'pure speech' toward . . . harmful, constitutionally unprotected conduct."[57]

In addition, when a statute seeks to regulate conduct rather than speech, "the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."[58]

Aside from the fact that the statute, by its terms, regulates "conduct," the legislative history demonstrates that the Act was directed against serious judicial transgressions, not against protected speech.[59] According to the Senate Report, the statutory standard was "intended to

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57 *Id.* at 615.

58 *Id.; see also CSC v. Letter Carriers*, 413 U.S. 548, 580-81 (1973); *Parker v. Levy*, 417 U.S. 733, 760-61 (1974).

59 It is worth pointing out that federal judges, the individuals to whom the Act is directed, are unusually well qualified to interpret statutes in light of their legislative history.

include willful misconduct in office, willful and persistent failure to perform duties of the office, habitual intemperance, and other conduct prejudicial to the administration of justice that brings the judicial office into disrepute.[60]

The Senate Report further provided that the standard announced in the Act should be informed by the Code of Judicial Conduct of the American Bar Association, as approved by the Judicial Conference; resolutions of the Conference relating to judicial conduct; and congressional enactments concerning judicial conduct.[61] In addition, any fears that the statutory prohibition might be directed against protected expression are allayed, in large measure, by the explicit exemption of com-

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60 S. Rep. No. 362, 96th Cong., 1st Sess. 9 (1979), *reprinted in* 1980 U.S. Code Cong. & Ad. News 4315, 4323. *See also* H.R. Rep. No. 1313, 96th Cong., 2d Sess. 10 (1980).

61 S. Rep. No. 96-362, at 9. *See also Hastings II*, 783 F.2d at 1513 n.22.

plaints "directly related to the merits of a decision or procedural ruling."[62] Thus, whatever margin exists for reading the Act to apply to protected First Amendment activity, it cannot be said that it "reaches a substantial amount of constitutionally protected conduct," *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95 (1982).[63]

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62 28 U.S.C. § 372(c)(3)(A)(ii).

63 As evidence of the Act's potential to chill First Amendment activity, the appellant points to a second complaint pending against him, filed by Thomas M. Tucker, a Florida attorney who alleges that Judge Hastings violated laws prohibiting political campaigning by federal employees. The Tucker complaint, however, was not mentioned in the appellant's complaint to the district court, and claims concerning it are not properly before this court. We do note that the existence of such charges against Judge Hastings are hardly probative of a "chilling effect." Indeed, it is by no means clear that the speech to which the complaint is directed is constitutionally protected, since "neither the First Amendment nor any other provision of the Constitution invalidates a law barring . . . partisan political conduct by federal employees." *See CSC v. National Association of Letter Carriers*, 413 U.S. 548, 556 (1973) (upholding the Hatch Act

Thus, in this case, any remaining overbreadth in the terms of the Act is clearly outweighed by the legitimate and important objective of the Act, especially since there was no practical alternative to a broad statutory standard. It would be literally impossible for Congress to anticipate and to specify every form of properly sanctionable misconduct. Not surprisingly, precedent does not indicate so hypertrophied a concern with overbreadth as to require the impossible.[64]

The appellant's vagueness challenge must also fail, since "[o]ne to whose conduct a statute clearly applies may not successfully challenge it for vagueness."[65] There can be no doubt that the

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against a facial attack of its constitutionality).

64 *See Arnett v. Kennedy*, 416 U.S. 134, 158-64 (1974) (opinion of Rehnquist, J.) (upholding "for cause" removal standard of civil service statute against challenge based on vagueness and overbreadth).

65 *Parker v. Levy*, 417 U.S. 733, 756 (1974).

charges alleged against the appellant -- conspiracy to solicit a bribe and obstruction of justice -- are squarely within the statutory prohibition. The Act is certainly clear enough to put the appellant on notice that criminal, and potentially impeachable, misconduct falls within its ambit. And "[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others."[66]

E. *Due Process Claims -- As Applied*[67]

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66 *Village of Hoffman Estates*, 455 U.S. at 495 (footnote omitted). "The Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe." *Id.* at 498-99 (footnote omitted).

67 In addition to the due process claims mentioned in this section, appellant (1) renews his Compensation Clause challenge to the Act, now as applied to him; (2) argues that application of the Act to him undermined the exclusive power of the House to impeach; and (3) maintains that double jeopardy and speedy trial concerns are implicated because the proceedings under the Act had the effect of delaying ac-

Judge Hastings alleges certain due process and other constitutional defects in the investigation as it unfolded. He maintains that (1) Judge Johnson, who allegedly expressed his view in the *Borders* opinion that Judge Hastings participated in the conspiracy, tainted the Investigating Committee's proceedings with his "bias in fact;" (2) the members of the Council failed to conduct an independent review of the evidence; and (3) the Council refused to let Judge Hastings have a copy of the Investigating Committee's report, requir-

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tion by the House. Brief for Appellant at 42-45. We have already determined that failure to satisfy the exhaustion requirement bars our consideration of the Compensation Clause claim at this time, *see supra* at 24-25. Furthermore, our discussion of the certification issue, *see supra* at 20-24, makes it abundantly clear that, regardless of whether appellant exhausted his remedies before the Council and the Conference, the second and third claims lack merit. Of course, we express no view on whether impeachment by the House and conviction by the Senate are in any way constrained by double jeopardy or speedy trial concerns.

ing him to travel from Miami to Atlanta with his counsel to examine the report.

Because the district court incorrectly treated these issues as precluded, we remand them for its further consideration. In evaluating the claims, the district court should examine whether Judge Hastings presented his allegations at an appropriate stage in the investigative proceedings, and whether he exhausted his administrative remedies as required by 28 U.S.C. § 372(c)(10).[68] If the district court determines that Judge Hastings did properly raise and exhaust any of his due process claims in the course of the inves-

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68 Section 372(c)(10) provides, in relevant part:

> A complainant, judge, or magistrate aggrieved by a final order of the chief judge under paragraph (3) of this subsection may petition the judicial council for review thereof. A complainant, judge, or magistrate aggrieved by an action of the judicial council under paragraph (6) of this subsection may petition the Judicial Conference of the United States for review thereof.

tigation, and administrative review process, it should next consider whether judicial review of such claims is permitted under 28 U.S.C. § 372(c)(10).[69] If judicial review is appropriate, the court should reach the merits of the claims.

Affirmed in part, reversed and remanded in part.

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69 The appellees argue that judicial review of the due process challenges to the Act as applied is inappropriate under 28 U.S.C. § 372(c)(10), the relevant portion of which provides that "all orders and determinations, including denials of petitions for review, shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise." Although we do not decide the issue, we merely note for the district court on remand to consider the possibility that the actions under challenge here are not "orders" or "determinations" within the meaning of the Act, and therefore not covered by the bar to judicial review. We further note that sensitive and unsettled questions of constitutional law would arise if the challenged actions are covered by the prohibition on judicial review. *See Weinberger v. Salfi*, 422 U.S. 749, 762 (1975).

APPENDIX

I

The Act established a formal mechanism by which federal judges could be disciplined by fellow judges for "conduct prejudicial to the effective and expeditious administration of the business of the courts." 28 U.S.C. § 372(c)(1). "Any person" alleging such conduct on the part of a judge may set that mechanism in motion by filing with the clerk of the circuit in which the judge sits a complaint containing a "brief statement of the facts constituting such conduct." *Id.* The clerk of the court must then transmit the complaint to the chief judge of the circuit (or to the next most senior active service judge of that circuit, if the chief judge is the subject of the complaint), as well as to the judge who has been named in the complaint. The chief

judge, after "expeditiously reviewing a complaint," *id.* § 372(c)(3), may take any of several courses of action. He may dismiss the complaint if it either (1) fails to conform with the requirements for a complaint stated above, or (2) directly relates to the merits of a decision or procedural ruling, or (3) is frivolous. *Id.* § 372(c)(3)(A). The chief judge may also conclude the proceeding if he finds that "appropriate corrective action has been taken." *Id.* § 372(c)(3)(B).

If the chief judge neither dismisses the complaint nor concludes the action, he must appoint a special committee, consisting of himself plus equal members of circuit and district judges of the circuit, to investigate the facts and allegations contained in the complaint. *Id.* § 372(c)(4). The Act grants the committee the power to conduct an investigation "as

extensive as it considers necessary." *Id.* § 372(c)(5).

When the committee has completed its investigation, it is required to file with the judicial council of the circuit[1] "a comprehensive written report . . . present[ing] both the findings of the investigation and the committee's recommendations for necessary and appropriate action by the judicial council of the circuit." *Id.* § 372(a)(5). Upon receiving the committee's report, the circuit judicial council may conduct any additional investigation it considers necessary. In addition, the judicial council "shall take such action as is appropriate to assure the effective and expeditious administra-

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1 The judicial council of each circuit is presided over by the chief judge of the circuit and consists, in addition, of a certain number of circuit and district judges of that circuit, the number to be fixed by a majority vote of the active circuit judges of that circuit in accordance with 28 U.S.C. § 332(a) (1982).

tion of the business of the courts within the circuit." *Id.* § 372(a)(6)(B). Such action may include requesting that the judge voluntarily retire; ordering that, "on a temporary basis for a time certain," no further cases be assigned to the judge; and public or private censuring of the judge. *Id.*

Rather than take such action itself, however, the judicial council has the option of referring a complaint, along with the record of any proceedings undertaken to that point and the council's recommendations for appropriate action, to the Judicial Conference of the United States. *Id.* § 372(c)(7)(A).[2] The Act also requires transfer to the Judicial Conference of any case in which the circuit judicial

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2 The Judicial Conference is composed of the chief judges of all the circuits plus a designated district judge from each circuit, and is presided over by the Chief Justice of the United States. *See* 28 U.S.C. § 331 (1982).

council determines, on the basis of a complaint and an investigation under this subsection, or on the basis of "information otherwise available to the council," *id.* § 372(c)(7)(B), that a judge has engaged in conduct that either (1) might constitute one or more grounds for impeachment under Article I of the Constitution, or (2) "in the interest of justice, is not amenable to resolution by the judicial council." *Id.*

Having had proceedings transferred to it from a circuit judicial council via either of the above paths, the Judicial Conference "after consideration of the prior proceedings and such additional investigation as it considers appropriate," *id.* § 372(c)(8), shall by majority vote, take any of the courses of action, described above, that were open to the judicial council. In addition, if the Conference determines -- either on its own or upon

review of the judicial council's determination -- that consideration of impeachment may be warranted, it shall transmit its determination to the United States House of Representatives "for whatever action the House of Representatives considers to be necessary." *Id.*

In any investigation undertaken pursuant to the Act, the investigating body, be it the special committee, the circuit judicial council, or the Conference, is vested with full subpoena powers. *Id.* § 372(c)(9)(A), (B); *see id.* §§ 331, 332(d). The Act also gives each such body the power to prescribe rules for the conduct of its proceedings, although such rules must provide certain minimum procedural safeguards.[3]

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3 Such rules shall contain provisions requiring that --

(A) adequate prior notice of any investigation be given in writing

The Act expressly limits the availability of review of orders and determinations made under the Act. *See* 28 U.S.C. § 372(c)(10). A petition for review may be filed with the circuit judicial council by a complainant or judge aggrieved by an order of the chief judge, pursuant to § 372(c)(3), dismissing a complaint or concluding a proceeding, *see supra* p. 1095. An aggrieved complainant or judge may also petition the Judicial Conference for re-

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to the judge or magistrate whose conduct is the subject of the complaint;

(B) the judge or magistrate whose conduct is the subject of the complaint be afforded an opportunity to appear (in person or by counsel) at proceedings conducted by the investigating panel to present oral and documentary evidence, to compel the attendance of witnesses or the production of documents, to cross-examine witnesses, and to present argument orally or in writing; and

(C) the complainant be afforded an opportunity to appear at proceedings conducted by the investigating panel, if the panel concludes that the complainant could offer substantial information.

28 U.S.C. § 372(c)(11)(1982).

view of action taken by the judicial council pursuant to § 372(c)(6). With these two exceptions, "all orders and determinations, including denials of petitions for review, shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise." *Id.* at § 372(c)(10).

BUCKLEY, *Circuit Judge, concurring in part and dissenting in part*: While I concur with the substance of the court's opinion, I must disagree with the majority's treatment of the Judicial Conference certification mandated by Congress. In referring to 28 U.S.C. § 372(c)(7)(B), the majority correctly notes:

> Only when a council does elect -- in its discretion -- to consider the impeachment question, and determines that impeachment may be warranted, must it certify that determination to the Conference. The determination is discretionary but once made, the communication is mandatory. Because that communication is wholly within the judicial branch, however, it does not even suggest any separation-of-powers problem.

Majority opinion at 22. As the certification language in section 372(c)(8) is virtually identical to that to which the majority refers, I assume it would also affirm that if the Conference should concur in a council's determination of possible impeachability, certification would also be mandatory; but as the Conference's certification would be to the House of Representatives, I take it the majority would concede that in such a case there would be at least a "suggest[ion] of [a] separation-of-powers problem."

The majority finds, however, that even the suggestion is without merit, for two reasons. First,

> [t]he Conference is . . . free of any statutory compulsion ever to confront the impeachment issue . . . . Regardless of what determination, if any, a council has made, the Conference always has the option to refrain

> from making any determination . . . of whether a judge's misconduct may warrant impeachment.

Id. at 23. Second, even if the Conference were to make such a determination and, as commanded by statute, "so certif[ied] and transmit[ted] the determination and the record of proceedings to the House of Representatives," section 372(c)(8), such a communication is harmless and, in any event, "is without independent constitutional significance." *Id.* at 23. I address these arguments in turn.

The majority correctly states that the statute does not compel the Conference to address the question of impeachability; but while it does not require that the issue be addressed, it does command a process that at times will compel the principled jurists who comprise the Conference to reach the conclusion that the majority assures us they "ha[ve] the option to re-

frain from making" in a formal manner. If a council certifies a determination that a particular judge "has engaged in conduct which might constitute one or more grounds for impeachment under article I of the Constitution," the Judicial Conference is required by section 372(c)(8) to give consideration to the proceedings before the council. Therefore, the Conference has a clear duty to review the record that induced the council to conclude that one of its colleagues may have engaged in impeachable conduct.

It is hard for me to believe that the members of the Conference, all of them experienced jurists, will not emerge from their examination without some clear view as to whether it supports the council's conclusion of possible impeachability; and if the evidence in question supports charges of particularly egregious conduct, that they would not feel compelled, out of

their concern for the integrity of the federal judiciary, to accept the statute's invitation to confirm their conclusion through a formal determination. In short, I believe there is an element of unreality in the majority's reliance on the formal right of the Conference to avoid what under particular circumstances will undoubtedly be perceived as a clear duty. In such a case, I do not see how one can conclude that the Conference is truly free to avoid making a determination, as the "choice" with which it is presented allows for but one principled conclusion, and therefore allows for no choice at all.

Furthermore, I am not persuaded that certification to the House is as harmless an event as the majority would have us believe, or that it can be equated with "a private informant's suggestion that a judge may have committed an impeachable offense," *id.*, however eminent the infor-

mant. A Conference determination, after all, reflects the considered conclusion by the Chief Justice of the United States and the chief judges of all the circuit courts of appeal, after review of a voluminous record assembled with the help of sworn testimony and the exercise of subpoena power, that a particular judge has engaged in behavior that may warrant impeachment. The potential impact of that determination is such that I would not reject as entirely frivolous appellant's claim that a Conference certification "might substantially alter the political context in which impeachment recommendations are brought before the House from that intended by the Framers -- making it more difficult for the House to decline to impeach in the face of an express recommendation." *Id.* n.48 (citation omitted).

Nor is it self-evidence that "any difference in the effect on Congress" be-

tween a private citizen's recommendation and a certification by the Conference "is without constitutional significance . . . for it is beyond doubt that the Conference, just like any other individual or group, may inform the Congress when it believes that a judge may have breached his public trust." The problem with this argument is that the constitutional issue raised by appellant is not whether the Conference is free to inform the House of its conclusion as to the possible impeachability of a particular judge, but whether the House may constitutionally command that it do so. The former does not impinge on the separation of powers; the latter might.

I have reached no conclusion as to whether the certification requirement represents such an unconstitutional encroachment on an independent branch of the federal government. I do believe, however,

that we should either address the issue directly or choose a less ingenuous way to avoid reaching the constitutional issue.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HON. ALCEE L. HASTINGS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 86-2353
	)	
JUDICIAL CONFERENCE OF THE UNITED STATES, ET AL.,	)	
	)	
Defendants;	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Intervening Defendant.	)	

MEMORANDUM

This is the latest in a series of cases brought by U.S. District Judge Alcee L. Hastings or on his behalf, raising procedural and constitutional claims to thwart or prevent an inquiry into his judicial behavior, initiated by the Judicial Council of the Eleventh Circuit acting on a complaint filed pursuant to the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, 28 U.S.C. §§ 331,

332, 372(c), 604 (1982) [hereinafter "the Act"]. Over a period of years these claims have been adjudicated adversely to Judge Hastings and on three occasions the Supreme Court of the United States has denied review of his constitutional claims.

The inquiry has progressed and is now in its final stages. On September 2, 1986, the Council certified to the Conference of the United States its determination that Judge Hastings

> has engaged in conduct which might constitute one or more grounds for impeachment under Article I of the Constitution, in that: (a) in an effort to avoid conviction on the charge of conspiracy to solicit and accept a bribe in exchange for a judicial act Judge Hastings engaged in obstruction of justice in preparing for and at trial and gave false sworn testimony at trial; and (b) Judge Hastings did in fact engage in such conspiracy.[1]

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1 Exhibit D to Supplemental Affidavit of Plaintiff in Support of Motion for Preliminary Injunction, filed September 11, 1986, at 5.

The Council is also submitting to the Conference a report prepared by the Council's investigating committee of judges, along with exhibits received and transcripts of testimony taken during the inquiry.

At this stage, Judge Hastings wishes to litigate again all aspects of his constitutional attack on the Act, and in the interim seeks a preliminary injunction to bar any action by the Conference formally certifying to the House of Representatives its concurrence in the determination of the Council or its own determination on matters raised by the Council.[2] The United States has intervened pursuant to 28 U.S.C. § 2403 (1982) and, along with counsel for the Council's investigating

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2 See 28 U.S.C. § 372(c)(8) (1982) ("If the Judicial Conference [determines] that consideration of impeachment may be warranted, it shall so certify and transmit the determination and record of proceedings to the House of Representatives for whatever action the House of Representatives considers to be necessary").

committee, has moved to dismiss and has opposed the motion for preliminary injunction. The Court has heard full oral argument, and has considered the extensive affidavits and briefs submitted.

The Conference has taken no action pursuant to the Act with respect to reviewing the certification from the Council, nor has it indicated what procedures, if any, it will follow before determining whether or not Judge Hastings' conduct may in its opinion warrant consideration of impeachment by the House of Representatives. Judge Hastings has not decided whether to request a hearing before the Judicial Conference. To date he has not been willing to assist with factual development of the issues. Accordingly, all issues sought to be raised as to procedures before the Conference are not ripe.

Moreover, all but one of Judge Hastings' other constitutional claims have

been litigated and decided adversely to his present contentions in the course of his prior litigation. He is therefore prevented by well-established preclusion doctrine from asking this Court for another chance to address these matters.[3] Each claim is barred by final rulings in one or more of the following cases, in all of which Judge Hastings actively participated and was given a full opportunity to raise all presentable claims. In each case he personally, but unsuccessfully, sought review by the Supreme Court on writ

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3 Under the doctrine of issue preclusion, or "collateral estoppel," Judge Hastings is precluded from raising issues that were actually and necessarily decided in litigation in which he was either a party or was privy to. Under the doctrine of claim preclusion, or "res judicata," he is prevented from raising any issues that were addressed or might have been addressed in previous litigation with the defendants named herein. See, e.g., Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75, 77 n.1 (1984); see also Memorandum of Defendants and Defendant-Intervenor, filed September 9, 1986, at 18-19, 28.

of certiorari: In the Matter of Certain Complaints Under Investigation by an Investigating Committee of the Judicial Council of the Eleventh Circuit, 783 F.2d 1488 (11th Cir. 1986), aff'g in part and rev'g in part on other grounds Williams v. Mercer, 610 F. Supp. 169 (S.D. Fla. 1985), cert. denied sub nom. Hastings v. Godbold, 106 S. Ct. 3273 (1986) [hereinafter "In the Matter of Certain Complaints"];[4] Hastings v. Judicial Conference of the United States, 770 F.2d 1093 (D.C. Cir. 1985), aff'g in part and vacating in part 593 F. Supp. 1371 (D.D.C. 1984), cert. denied 106 S. Ct. 3272 (1986); In re Petition to Inspect and Copy Grand Jury Materials, 735 F.2d 1261 (1984), aff'g 576 F.

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4 Judge Hastings' close involvement with this litigation is amply documented by John Doar's memorandum submitted on behalf of the Council in opposition to the preliminary injunction motion, filed September 10, 1986, at 2-5. See also Memorandum of Defendants and Defendant-Intervenor, filed September 9, 1986, at 29-35.

Supp. 1275 (S.D. Fla. 1983), cert. denied sub nom. Hastings v. Investigating Committee of the Judicial Council of the Eleventh Circuit, 105 S. Ct. 254 (1984).

The one constitutional claim not yet reviewed concerns Judge Hastings' contention, delineated primarily at oral argument, that Congress has no authority to require the Conference to certify to it any determination it may reach that consideration of impeachment may be warranted by the House of Representatives.[5] This issue is ripe, but it has no merit.

The certified determinations made by the Council or any developed by the Conference will in no way constitute factual findings that need be accepted by either branch of Congress or that bind Congress in any way. Impeachment proceedings are

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5 The opinion in In the Matter of Certain Complaints expressly refrained from ruling on this issue. See 783 F.2d at 1512.

not automatic. In the event impeachment proceedings are initiated by the House of Representatives, these determinations may be considered or wholly ignored, as either house of Congress deems fit. Any certification of the Council or the Conference is merely informational, nothing more, to be granted only such weight as Congress in its wisdom wishes. The Judiciary is deciding nothing for Congress, which will completely control all aspects of any impeachment process. The Act must be so interpreted to preserve its constitutionality. Construed in this manner, the Act fully recognizes and protects the constitutional separation of powers.

It is suggested, however, that the behavior of a sitting federal judge is not a judicial matter and thus the powers granted the Federal Judiciary under the Act are constitutionally misplaced. Quite the opposite is the case. Congress has

merely acted to facilitate the ability of the Judiciary to administer its own affairs and, as part of this effort, has indicated a method by which the Judiciary may bring to the attention of Congress information concerning a judge that may be of possible relevance to Congress's responsibilities under Article I of the Constitution. As prior opinions canvassing Judge Hastings' constitutional attacks have demonstrated, the general goal of strengthening the Federal Judiciary in this manner is entirely proper. Because any certification under the Act has only informational effect, no further constitutional issue is raised by the mandatory nature of the requirement that the Conference certify to the House of Representatives its determination that impeachment may be warranted.

Judge Hastings makes no suggestion that the report from the Council's inves-

tigating committee or the underlying record should be withheld from congressional scrutiny. Indeed, he urges public disclosure. Because no certification or determination under the Act has any legal effect whatsoever on Judge Hastings' rights in an impeachment proceeding, he will suffer no injury if the Conference eventually certifies some aspect of this matter to Congress. The public interest urgently requires that the protracted proceeding initiated under the Act continue to conclusion. There is no prospect of success on the merits.

Accordingly, no ground for interim relief has been shown and the motion for preliminary injunction is denied on the basis of the foregoing findings of fact and conclusions of law. The complaint is

dismissed for failure to state a claim on which relief can be granted.

UNITED STATES DISTRICT JUDGE

September 12, 1986.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HON. ALCEE L. HASTINGS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 86-2353
	)	
JUDICIAL CONFERENCE OF THE UNITED STATES, ET AL.,	)	
	)	
Defendants;	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Intervening Defendant.	)	

ORDER

For reasons stated in an accompanying Memorandum filed herewith, plaintiff's motion for preliminary injunction is denied and defendant's motion to dismiss is granted.

SO ORDERED.

UNITED STATES DISTRICT JUDGE

September 12, 1986.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-5588

September Term, 1986
Civil Action No. 86-2353

ALCEE L. HASTINGS, HONORABLE,
U.S. DISTRICT JUDGE,
U.S. DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF FLORIDA, APPELLANT

v.

JUDICIAL CONFERENCE OF THE U.S., et al.

Appeal from the United States District
Court for the District of Columbia

Before: RUTH B. GINSBURG, BUCKLEY, and
D.H. GINSBURG, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by this Court, that the judgment of the District Court appealed from in this cause is hereby affirmed in part, reversed and remanded in part, all in accordance with the Opinion for the Court filed herein this date.

Per Curiam
For The Court

George A. Fisher
Clerk

Date: September 15, 1987

Opinion for the Court filed by Circuit Judge D.H. Ginsburg.

Opinion concurring in part and dissenting in part filed by Circuit Judge Buckley.

Article. I.

Section. 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section. 2. * * *

[Clause 5.] The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section. 3. * * *

[Clause 6.] The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried the Chief

Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

[Clause 7.] Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Section. 8. Congress shall have Power

[Clause 9.] To constitute Tribunals inferior to the Supreme Court; . . .

[Clause 18.] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitu-

tion in the Government of the United States, or in any Department or Officer thereof.

Article. II.

Section. 1. The Executive Power shall be vested in a President of the United States of America. * * *

Section. 2. * * *

[Clause 2.] He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment

of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

* * *

Section. 4. The President, Vice President and all Civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

Article. III.

Section. 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which

shall not be diminished during their Continuance in Office.

Section. 2. The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Public Law 96-458
96th Congress

An Act

To revise the composition of the judicial councils of the Federal judicial circuits, to establish a procedure for the processing of complaints against Federal judges, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

Section 1. This act may be cited as the "Judicial Councils Reform and Judicial Conduct and Disability Act of 1980".

JUDICIAL COUNCILS OF THE CIRCUITS

Sec. 2.(a) Section 332(a) of title 28, United States Code, is amended to read as follows:

"(a)(1) The chief judge of each judicial circuit shall call, at least twice in each year and at such places as he may designate, a meeting of the judicial council of the circuits, consisting of --

"(A) the chief judge of the circuit, who shall preside;

(B) that number of circuit judges fixed by majority vote of of all such judges in regular active service; and

"(C) that number of district judges of the circuit fixed by majority vote of all circuit judges in regular active service, except that --

"(i) if the number of circuit judges fixed in accordance with subparagraph (B) of this paragraph is less than six, the number of district judges fixed in accordance with this subparagraph shall be no less than two; and

"(ii) if the number of circuit judges fixed in accordance with subparagraph (B) of this paragraph is six or more, the number of district judges fixed in accordance with this subparagraph shall be no less than three.

"(2) Members of the council shall serve for terms established by a majority vote of all judges of the circuit in regular active service.

"(3) The number of circuit and district judges fixed in accordance with paragraphs (1)(B) and (1)(C) of this subsection shall be set by order of the court of appeals for the circuit no less than six months prior to a scheduled meeting ot the council so constituted.

"(4) Only circuit and district judges in regular active service shall serve as members of the council.

"(5) No more than one district judge from any one district shall serve simultaneously on the council, unless at least one district judge from each district within the circuit is already serving as a member of the council.

"(6) In the event of the death, resignation, retirement, or disability of a member of the council, a replacement member shall be designated to serve the remainder of the unexpired term by the chief judge of the circuit.

"(7) Each member of the council shall attend each council meeting unless excused by the chief judge of the circuit.".

(b) Section 332(c) of title 28, United States Code, is amended by striking out "quarterly" and inserting in lieu thereof "semiannually".

(c) Section 332(d) of title 28, United States Code, is amended to read as follows:

"(d)(1) Each judicial council shall make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit. Each council is authorized to hold

hearings, to take sworn testimony, and to issue subpoenas and subpoenas duces tecum. Subpoenas and subpoenas duces tecum shall be issued by the clerk of the court of appeals, at the direction of the chief judge of the circuit or his designee and under the seal of the court, and shall be served in the manner provided in rule 45(c) of the Federal Rules of Civil Procedure for subpoenas and subpoenas duces tecum issued on behalf of the United States or an officer or agency thereof.

"(2) All judicial officers and employees of the circuit shall promptly carry into effect all orders of the judicial council.

"(3) Unless an impediment to the administration of justice is involved, regular business of the courts need not be referred to the council.".

(d)(1) The section heading for section 332 of title 28, United States Code, is amended to read as follows:

"§ 332. Judicial councils of circuits".

(2) The item relating to section 332 in the section analysis for chapter 15 of title 28, United States Code, is amended to read as follows:

"332. Judicial councils of circuits.".

PROCEDURES WITHIN JUDICIAL COUNCILS

SEC. 3.(a) Section 372 of title 28, United States Code, is amended by adding at the end thereof the following new subsection:

"(c)(1) Any person alleging that a circuit, district, or bankruptcy judge, or a magistrate, has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts, or alleging that such a judge or magistrate is unable to discharge all the

duties of office by reason of mental or physical disability, may file with the clerk of the court of appeals for the circuit a written complaint containing a brief statement of the facts constituting such conduct.

"(2) Upon receipt of a complaint filed under paragraph (1) of this subsection, the clerk shall promptly transmit such complaint to the chief judge of the circuit, or, if the conduct complained of is that of the chief judge, to that circuit judge in regular active service next senior in date of commission (hereafter, for purposes of this subsection only, included in the term 'chief judge'). The clerk shall simultaneously transmit a copy of the complaint to the judge or magistrate whose conduct is the subject of the complaint.

"(3) After expeditiously reviewing a complaint, the chief judge, by written order stating his reasons, may --

"(A) dismiss the complaint, if he finds it to be (i) not in conformity with paragraph (1) of this subsection, (ii) directly related to the merits of a decision or procedural ruling, or (iii) frivolous; or

"(B) conclude the proceeding if he finds that appropriate corrective action has been taken.

The chief judge shall transmit copies of his written order to the complainant and to the judge or magistrate whose conduct is the subject of the complaint.

"(4) If the chief judge does not enter an order under paragraph (3) of this subsection, such judge shall promptly--

"(A) appoint himself and equal numbers of circuit and district judges of the circuit to a special committee to investigate the facts and allegations contained in the complaint;

"(B) certify the complaint and any other documents pertaining thereto to each member of such committee; and

"(c) provide written notice to the complainant and the judge or magistrate whose conduct is the subject of the complaint of the action taken under this paragraph.

"(5) Each committee appointed under paragraph (4) of this subsection shall conduct an investigation as extensive as it considers necessary, and shall expeditiously file a comprehensive written

report thereon with the judicial council of the circuit. Such report shall present both the findings of the investigation and the committee's recommendations for necessary and appropriate action by the judicial council of the circuit.

"(6) Upon receipt of a report filed under paragraph (5) of this subsection, the judicial council--

"(A) may conduct any additional investigation which it considers to be necessary;

"(B) shall take such action as is appropriate to assure the effective and expeditious administration of the business of the courts within the circuit, including, but not limited to, any of the following actions:

"(i) directing the chief judge of the district of the magistrate whose conduct is the

subject of the complaint to take such action as the judicial council considers appropriate;

"(ii) certifying disability of a judge appointed to hold office during good behavior whose conduct is the subject of the complaint, pursuant to the procedures and standards provided under subsection (b) of this section;

"(iii) requesting that any such judge appointed to hold office during good behavior voluntarily retire, with the provision that the length of service requirements under section 371 of this title shall not apply;

"(iv) ordering that, on a temporary basis for a time certain, no further cases be assigned to any judge or magistrate whose conduct is the subject of a complaint;

"(v) censuring or reprimanding such judge or magistrate by means of private communication;

"(vi) censuring or reprimanding such judge or magistrate by means of public announcement; or

"(vii) ordering such other action as it considers appropriate under the circumstances, except that (I) in no circumstances may the council order removal from office of any judge appointed to hold office during

good behavior, and (II) any removal of a magistrate shall be in accordance with section 631 of this title and any removal of a bankruptcy judge shall be in accordance with section 153 of this title; and

"(C) shall immediately provide written notice to the complainant and to such judge or magistrate of the action taken under this paragraph.

"(7)(A) In addition to the authority granted under paragraph (6) of this subsection, the judicial council may, in its discretion, refer any complaint under this subsection, together with the record of any associated proceedings and its recommendations for appropriate action, to the Judicial Conference of the United States.

"(B) In any case in which the judicial council determines, on the basis of a complaint and an investigation under this subsection, or on the basis of information otherwise available to the council, that a judge appointed to hold office during good behavior has engaged in conduct--

> "(i) which might constitute one or more grounds for impeachment under article I of the Constitution; or
>
> "(ii) which, in the interest of justice, is not amenable to resolution by the judicial council, the judicial council shall promptly certify such determination, together with any complaint and a record of any associated proceedings, to the

Judicial Conference of the United States.

"(C) A judicial council acting under authority of this paragraph shall, unless contrary to the interests of justice, immediately submit written notice to the complainant and to the judge or magistrate whose conduct is the subject of the action taken under this paragraph.

"(8) Upon referral or certification of any matter under paragraph (7) of this subsection, the Judicial Conference, after consideration of the prior proceedings and such additional investigation as it considers appropriate, shall by majority vote take such action, as described in paragraph (6)(B) of this subsection, as it considers appropriate. If the Judicial Conference concurs in the determination of the council, or makes its own determination, that consideration of impeachment

may be warranted, it shall so certify and transmit the determination and the record of proceedings to the House of Representatives for whatever action the House of Representatives considers to be necessary.

"(9)(A) In conducting any investigation under this subsection, the judicial council, or a special committee appointed under paragraph (4) of this subsection, shall have full subpoena powers as provided in section 332(d) of this title.

"(B) In conducting any investigation under this subsection, the Judicial Conference, or a standing committee appointed by the Chief Justice under section 331 of this title, shall have full subpoena powers as provided in that section.

"(10) A complainant, judge, or magistrate aggrieved by a final order of the chief judge under paragraph (3) of this

subsection may petition the judicial council for review thereof. A complainant, judge, or magistrate aggrieved by an action of the judicial council under paragraph (6) of this subsection may petition the Judicial Conference of the United States for review thereof. The Judicial Conference, or the standing committee established under section 331 of this title, may grant a petition filed by a complainant, judge, or magistrate under this paragraph. Except as expressly provided in this paragraph, all orders and determinations, including denials of petitions for review, shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise.

"(11) Each judicial council and the Judicial Conference may prescribe such rules for the conduct of proceedings under this subsection, including the processing

of petitions for review, as each considers to be appropriate. Such rules shall contain provisions requiring that--

"(A) adequate prior notice of any investigation be given in writing to the judge or magistrate whose conduct is the subject of the complaint;

"(B) the judge or magistrate whose conduct is the subject of the complaint be afforded an opportunity to appear (in person or by counsel) at proceedings conducted by the investigating panel, to present oral and documentary evidence, to compel the attendance of witnesses or the production of documents, to cross-examine witnesses, and to present argument orally or in writing; and

"(C) the complainant be afforded an opportunity to appear at proceedings conducted by the investigating panel, if the panel concludes that the complainant could offer substantial information.

Any rule promulgated under this subsection shall be a matter of public record, and any such rule promulgated by a judicial council may be modified by the Judicial Conference.

"(12) No judge or magistrate whose conduct is the subject of an investigation under this subsection shall serve upon a special committee appointed under paragraph (4) of this subsection, upon a judicial council, upon the Judicial Conference, or upon the standing committee established under section 331 of this

title, until all related proceedings under this subsection have been finally terminated.

"(13) No person shall be granted the right to intervene or to appear as amicus curiae in any proceeding before a judicial council or the Judicial Conference under this subsection.

"(14) All papers, documents, and records of proceedings related to investigations conducted under this subsection shall be confidential and shall not be disclosed by any person in any proceeding unless--

> "(A) the judicial council of the circuit, the Judicial Conference of the United States, or the Senate or the House of Representatives by resolution, releases any such material which is believed necessary to an

impeachment investigation on trial of a judge under article I of the Constitution; or

"(B) authorized in writing by the judge or magistrate who is the subject to the complaint and by the chief judge of the circuit, the Chief Justice, or the chairman of the standing committee established under section 331 of this title.

"(15) Each written order to implement any action under paragraph (6)(B) of this subsection, which is issued by a judicial council, the Judicial Conference, or the standing committee established under section 331 of this title, shall be made available to the public through the appropriate clerk's office of the court of appeals for the circuit. Unless contrary

to the interests of justice, each such order issued under this paragraph shall be accompanied by written reasons therefor.

"(16) Except as expressly provided in this subsection, nothing in this subsection shall be construed to affect any other provision of this title, the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Federal Rules of Appellate Procedure, or the Federal Rules of Evidence.

"(17) The Court of Claims, the Court of Customs and Patent Appeals, and the Customs Court shall each prescribe rules, consistent with the foregoing provisions of this subsection, establishing procedures for the filing of complaints with respect to the conduct of any judge of such court and for the investigation and resolution of such complaints. In investigating and taking action with respect

to any such complaint, each such court shall have the powers granted to a judicial council under this subsection.".

(b) The section heading for section 372 of title 28, United States Code, is amended to read as follows:

"§ 372. Retirement for disability; substitute judge on failure to retire; judicial discipline.".

(c) The item relating to section 372 in the section analysis for chapter 17 of title 28, United States Code, is amended to read as follows:

"372. Retirement for disability; substitute judge on failure to retire; judicial discipline.".

AUTHORITY OF THE JUDICIAL CONFERENCE

SEC. 4. The fourth undesignated paragraph of section 331 of title 28, United States Code, is amended to read as follows:

"The Conference shall make a comprehensive survey of the condition of business in the courts of the United States and prepare plans for assignment of judges to or from circuits or districts where necessary. It shall also submit suggestions and recommendations to the various courts to promote uniformity of management procedures and the expeditious conduct of court business. The Conference is authorized to exercise the authority provided in section 372(c) of this title as the Conference, or through a standing committee. If the Conference elects to establish a standing committee, it shall be appointed by the Chief Justice and all petitions for review shall be reviewed by that committee. The Conference or the standing committee may hold hearings, take sworn testimony, issue subpoenas and subpoenas duces tecum, and

make necessary and appropriate orders in the exercise of its authority. Subpoenas and subpoenas duces tecum shall be issued by the clerk of the Supreme Court or by the clerk of any court of appeals, at the direction of the Chief Justice or his designee and under the seal of the court, and shall be served in the manner provided in rule 45(c) of the Federal Rules of Civil Procedure for subpoenas and subpoenas duces tecum issued on behalf of the United States or an officer or any agency thereof. The Conference may also prescribe and modify rules for the exercise of the authority provided in section 372(c) of this title. All judicial officers and employees of the United States shall promptly carry into effect all orders of the Judicial Conference or the standing committee established pursuant to this section.".

ADMINISTRATIVE OFFICE OF UNITED STATES COURTS

SEC. 5. Section 604 of title 28, United States Code, is amended by adding at the end the following new subsection:

"(h)(1) The Director shall, out of funds appropriated for the operation and maintenance of the courts, provide facilities and pay necessary expenses incurred by the judicial councils of the circuits and the Judicial Conference under section 372 of this title, including mileage allowance and witness fees, at the same rate as provided in section 1821 of this title. Administrative and professional assistance from the Administrative Office of the United States Courts may be requested by each judicial council and the Judicial Conference for purposes of discharging their duties under section 372 of this title.

"(2) The Director of the Administrative Office of the United States Courts shall include in his annual report filed with the Congress under this section a summary of the number of complaints filed with each judicial council under section 372(c) of this title, indicating the general nature of such complaints and the disposition of those complaints in which action has been taken.".

AUTHORIZATION OF APPROPRIATIONS

SEC. 6. There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this Act.

EFFECTIVE DATE

SEC. 7. This Act shall become effective on October 1, 1981.

No. 87-1187

In the Supreme Court of the United States

OCTOBER TERM, 1987

ALCEE L. HASTINGS, JUDGE,
UNITED STATES DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF FLORIDA, PETITIONER

v.

JUDICIAL CONFERENCE OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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22 pp

QUESTION PRESENTED

Whether the court of appeals correctly rejected various challenges, based primarily on separation-of-powers and due process principles, to the proceedings that have resulted in the Judicial Conference of the United States certifying to the House of Representatives, pursuant to 28 U.S.C. 372(c)(8), its conclusion that consideration of impeachment may be warranted because petitioner conspired to solicit a bribe and obstructed justice to avoid conviction.

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION[1]

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-85) is reported at 829 F.2d 91. The opinion of the district court (Pet. App. 86-96) is reported at 657 F.Supp. 672.

JURISDICTION

The judgment of the court of appeals (Pet. App. 98-99) was entered on September 15, 1987. On December 16,

[1] In addition to the United States, this brief is filed on behalf of the Judicial Conference of the United States, the Judicial Conference's Committee to Review Circuit Council Conduct and Disability Orders, and the Chief Justice of the United States. The Eleventh Circuit's judicial council and the five judges who composed the committee that investigated petitioner and reported to the judicial counsel are also respondents.

1987, the time for filing a petition for a writ of certiorari was extended by order of Justice Brennan to January 13, 1988, and a petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress adopted the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 Act (codified at 28 U.S.C. 331, 332, 372(c), 604(h); *reprinted in* Pet. App. 106-132) in order to provide a means for the federal judiciary to exercise supervisory control over the administration of it own affairs. Congress believed that the new system, which in large part mirrors that previously adopted by the Judicial Conference of the United States and various circuit judicial councils (see *Judicial Tenure and Discipline—1979-1980: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 96th Cong., 1st & 2d Sess. 63 (1979-1980)), would enable Article III judges to " 'put their own house in order' " (*Chandler* v. *Judicial Council*, 398 U.S. 74, 85 (1970)) and thereby reinforce the integrity of the judicial system.

Under the Act, any person may file a complaint with the clerk of a court of appeals alleging that a judge or a magistrate in the circuit either "has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts" or "is unable to discharge all the duties of office by reason of mental or physical diability" (28 U.S.C. 372(c)(1)). If the chief judge of the circuit finds that the complaint is "frivolous," that it is "directly related to the merits of a decision or procedural ruling," or that the matter prompting the complaint has already been resolved, he may issue a written order terminating the proceeding (28 U.S.C. 372(c)(3)). Otherwise the chief judge is

directed to empanel a special committee, composed of "himself and equal numbers of circuit and district judges of the circuit," to conduct an investigation "as extensive as it considers necessary" into the matters raised in the complaint (28 U.S.C. 372(c)(4)-(5)). The committee is required to give notice to the judge or magistrate whose conduct is the subject of the complaint (28 U.S.C. 372(c)(11)(A)), who then has the right to appear before the committee in person or by counsel, present oral and documentary evidence, compel the attendance of witnesses and the production of documents, and cross-examine adverse witnesses (28 U.S.C. 372(c)(11)(B)).

After concluding its investigation, the committee is required to file a report with the circuit's judicial council (28 U.S.C. 372(c)(5)), which may choose to conduct a further investigation (28 U.S.C. 372(c)(6)(A)). The Act provides that upon consideration of the committee's report or the conclusion of any subsequent investigation, the judicial council may censure the judge privately or publicly, may direct that no further cases be assigned to the judge for a temporary period, may ask the judge to retire voluntarily, may certify the judge's disability, or may take such other action as it considers appropriate (28 US.C. 372(c)(6)(B)). The Act specifically precludes removal from office of "any judge appointed to hold office during good behavior" (28 U.S.C. 372(c)(6)(B)(vii)) and includes no provision that would authorize diminution of a judge's salary. If the judicial council determines that an Article III judge has engaged in conduct "which might constitute one or more grounds for impeachment," the council is required to certify that determination to the Judicial Conference of the United States (28 U.S.C. 372(c)(7)(A)-(B)), but the Act does not require the council to undertake to make such a determination.

Like the circuit judicial council, the Judicial Conference is empowered to conduct an additional investigation.[2] The Judicial Conference is authorized to impose the same sanctions available to the judicial council (28 U.S.C. 372(c)(8)). If the Judicial Conference "concurs in the determination of the council, or makes its own determination, that consideration of impeachment may be warranted," it is required to certify and transmit that determination and the record of proceedings to the House of Representatives (*ibid.*).

2. Petitioner is a United States District Judge for the Southern District of Florida. In March 1983, two district court judges filed a complaint against petitioner under 28 U.S.C. 372(c) alleging that he had engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts and that he had violated several canons of the Code of Judicial Conduct (see Pet. App. 13-14 & n.12). The complaint specifically referred to an indictment filed in 1981 charging petitioner with conspiring with an attorney to obtain a bribe, on which petitioner had been acquitted. See *United States* v. *Hastings*, 681 F.2d 706 (11th Cir. 1982), cert. denied, 459 U.S. 1203 (1983) (holding that the Impeachment Clause does not bar indictment of a sitting federal judge); *United States* v. *Borders*, 693 F.2d 1318 (11th Cir. 1982), cert. denied, 461 U.S. 905 (1983) (upholding conviction of petitioner's alleged co-conspirator). As provided by the Act, the Chief Judge of the Eleventh Circuit issued an order appointing himself and four other judges to a committee to investi-

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[2] The Judicial Conference is authorized by 28 U.S.C. 331 to exercise the authority provided in 28 U.S.C. 372(c) through a standing committee. The Conference has established a Committee to Review Circuit Council Conduct and Disability Orders to exercise its responsibilities to review council orders issued under 28 U.S.C. 372(c)(6).

gate the allegations in the complaint. In June 1983, the committee petitioned for access to the records of the grand jury that had indicted petitioner. The petition was granted over petitioner's objections. *In re Petition to Inspect & Copy Grand Jury Materials*, 576 F. Supp. 1275 (S.D. Fla. 1983), aff'd, 735 F.2d 1261 (11th Cir.), cert. denied, 469 U.S. 884 (1984).

Petitioner then brought suit in the United States District Court for the District of Columbia to enjoin the committee from proceeding with its investigation. He asserted in part that the Act violated separation-of-powers principles by authorizing judicial councils to investigate and discipline judges, thereby undermining the independence of the judiciary, and that the Act on its face violated various due process guarantees. The district court dismissed petitioner's claims, holding that the Act is constitutional on its face. *Hastings* v. *Judicial Conference*, 593 F. Supp. 1371 (D.D.C. 1984). On appeal, the District of Columbia Circuit affirmed the dismissal of petitioner's constitutional challenges, but did so on ripeness grounds. *Hastings* v. *Judicial Conference*, 770 F.2d 1093 (D.C. Cir. 1985). The court ruled that it would be premature to pass judgment on the constitutionality of the procedures created by the Act when those procedures for the most part had yet to be invoked against petitioner and ultimately might never be invoked (*id.* at 1099-1103).

At the same time that petitioner was contesting the constitutionality of the Act in the District of Columbia, related litigation was taking place in the Eleventh Circuit. In May 1985, the investigating committee directed that subpoenas be served on petitioner's secretary and on several of his then-current and former law clerks. The subpoenaed witnesses resisted enforcement of the subpoenas and petitioner sought to enjoin their enforcement. A specially designated panel of the Eleventh Circuit

(all of the active judges having recused themselves) authorized enforcement of the subpoenas. *Williams* v. *Mercer* (*In re Certain Complaints Under Investigation by an Investigating Comm. of the Judicial Council of the Eleventh Circuit*), 783 F.2d 1488 (11th Cir. 1986). After concluding that the parties had standing to raise constitutional arguments "going to the existence and investigatory authority of the Committee" (*id.* at 1502), it rejected the separation-of-powers claim that the Act improperly assigns executive functions to Article III judges by authorizing them to investigate fellow judges charged with misconduct, thereby undermining the independence of the judiciary.

Petitioner filed petitions for writs of certiorari seeking review of both the District of Columbia Circuit's decision and the Eleventh Circuit's decision. Both petitions contended that the Act's mechanisms for investigating and disciplining Article III judges offend separation-of-powers principles. No. 85-1301 (Question 2); No. 85-1609 (Question 3). The petitions were denied on June 23, 1986. 477 U.S. 904.

3. In August 1986, the committee investigating petitioner presented its report to the Eleventh Circuit's judicial council, recommending that the council determine and certify to the Judicial Conference that consideration of impeachment may be warranted. The judicial council subsequently presented the Judicial Conference with its own report, which concluded that petitioner has "engaged in conduct which might constitute one or more grounds for impeachment" by participating in a conspiracy to solicit a bribe and engaging in obstruction of justice in order to avoid conviction. Pet. App. 19.

Petitioner, meanwhile, filed the present suit in the United States District Court for the District of Columbia, renewing his challenges to the constitutionality of the Act.

The district court dismissed petitioner's complaint (Pet. App. 86-96). It ruled that all but one of petitioner's claims either were not ripe or were barred by prior judgments (*id.* at 89-92). The remaining claim was petitioner's contention that the Act violates separation-of-powers principles by authorizing the Judicial Conference to certify its determination that impeachment may be warranted to the House of Representatives. The court concluded that that contention, which is narrower than the argument rejected by the Eleventh Circuit that the Act violates separation-of-powers principles by assigning executive functions to Article III judges, was ripe since the judicial council had recommended that the Judicial Conference certify that impeachment may be warranted. The Court rejected petitioner's contention that the certification provision unconstitutionally delegates Congress's power of impeachment, explaining that a certified determination that impeachment may be warranted is "merely informational, nothing more, to be granted only such weight as Congress in its wisdom wishes" and that Congress "completely control[s] all aspects of any impeachment process" (*id.* at 93).

In March 1987, while appeal was pending in the District of Columbia Circuit, the Judicial Conference certified to the House of Representatives that it concurred in the judicial council's determination that consideration of impeachment may be warranted. Neither the judicial council nor the Judicial Conference has taken any disciplinary action toward petitioner.

4. The court of appeals affirmed the district court's judgment with respect to most of petitioner's claims and remanded several claims to the district court for further proceedings (Pet. App. 1-85). In affirming the dismissal of petitioner's principal claims, the court of appeals declined to give the Eleventh Circuit's prior judgment the broad preclusive effect accorded it by the district court. The

court of appeals ruled that the only claim precluded by the Eleventh Circuit's decision was petitioner's separation-of-powers challenge to the investigatory authority vested in the judiciary by the Act, a claim which had been directly and necessarily resolved by the Eleventh Circuit. Noting that petitioner "does not really deny that his broad claims relating to the investigatory process prescribed by the Act were decided," the court of appeals found no basis for permitting petitioner to relitigate that issue (*id.* at 33-38).

With respect to petitioner's other arguments, the court of appeals first rejected petitioner's separation-of-powers challenge to the Act's provisions for certifying possible impeachable conduct to the House of Representatives. Although the court of appeals thought that a significant constitutional question might arise if the Act compelled the judiciary to determine whether impeachable conduct had occurred, the court found that "both determination and therefore certification by both the councils and the Conference [are] entirely discretionary" under the Act (Pet. App. 41). The court of appeals concluded that if the Judicial Conference chose to exercise its discretion to make a determination that impeachment might be warranted in a particular case, the statutory requirement that such a determination be certified to the House of Representatives "is without independent constitutional significance" (*id.* at 45). While the House of Representatives might choose to give weight to the Judicial Conference's determination, the court of appeals noted that it might also give weight to representations of possible impeachable conduct made by other persons and concluded that any difference in the weight accorded the Judicial Conference's determination does not render the certification provision unconstitutional (*id.* at 46-47).[3]

[3] Judge Buckley, while agreeing that the Act does not require either a judicial council or the Judicial Conference to determine whether an

The court of appeals next rejected as premature petitioner's claim that the Act violates the Compensation Clause because it does not require the payment of his legal fees. The court explained that the Act authorizes the Director of the Administrative Office of the United States Courts to "pay necessary expenses incurred by the judicial councils of the circuits and the Judicial Conference" in proceedings under the Act (28 U.S.C. 604(h)(1)). Although the Director had previously told petitioner that he has no authority to reimburse petitioner's legal expenses based solely on petitioner's own request, petitioner had not applied to the judicial council or the Judicial Conference for a determination whether his legal expenses constitute a "necessary expense[] incurred by the judicial council[] * * * and the Judicial Conference." The court of appeals reasoned that petitioner should give the judicial council and the Judicial Conference an opportunity to consider his request for fees before ruling on the matter (Pet. App. 48-50).

The court of appeals then turned to petitioner's facial due process challenges to the Act. Relying on *Withrow* v. *Larkin*, 421 U.S. 35 (1975), the court concluded that the combination of investigative and adjudicatory functions vested in the judicial councils and the Judicial Conference by the Act is not inherently impermissible (Pet. App. 51-56). The court declined to reach the merits of petitioner's claim that the Act violates due process by not

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impeachable offense may have been committed, suggested in a separate opinion that petitioner's constitutional challenge to the certification procedures was nonetheless not "entirely frivolous" (Pet. App. 78-84). Judge Buckley emphasized, however, that he "ha[d] reached no conclusion as to whether the certification requirement represents * * * an unconstitutional encroachment on an independent branch of the federal government" (*id.* at 84). In all other respects, Judge Buckley concurred in the court's disposition of the appeal.

requiring the judicial councils and the Judicial Conference to allow accused judges to appear and challenge adverse evidence. It explained that petitioner had not asserted that he was denied the right to appear and challenge adverse evidence in his own proceedings and that "it makes no sense for a court to strike down a statute that has in fact been applied in a constitutional manner" (*id.* at 57-59).

The court of appeals next rejected petitioner's claims that the Act's prohibition of "conduct prejudicial to the effective and expeditious administration of the business of the courts" (28 U.S.C. 372(c)(1)) is unconstitutionally vague and overbroad. The court held that the vagueness claim fails because the charges that petitioner conspired to solicit a bribe and obstructed justice are clearly within the intendment of the statutory language, and " '[o]ne to whose conduct a statute clearly applies may not successfully challenge it for vagueness.' " Pet. App. 65-66 (quoting *Parker* v. *Levy*, 417 U.S. 733, 756 (1974)). With respect to the overbreadth claim, the court pointed out that the Act by its terms is directed at judicial misconduct rather than protected First Amendment activities, and the Act's legislative history clarifies that the Act is not aimed at protected speech (Pet. App. 61-64). Relying on *Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973), the court concluded that the Act is not invalid on overbreadth grounds because it does not reach a substantial amount of constitutionally protected activity and any incidental overbreadth is "clearly outweighed by the legitimate and important objective of the Act," particularly given the lack of a practical alternative to the Act's general standard (Pet. App. 64-65).

Having disposed of these claims, the court of appeals remanded the case for the district court to consider three specific constitutional challenges to the manner in which the proceedings concerning petitioner had been con-

ducted: that one of the judges serving on the investigating committee had displayed bias; that the judicial council had not independently reviewed the evidence assembled by the committee; and that the judicial council improperly required petitioner to travel from Miami to Atlanta to examine the committee's report (Pet. App. 66-69). The district court subsequently granted an unopposed motion by petitioner to stay proceedings on remand pending the disposition of the present petition for a writ of certiorari.

The House of Representatives has not yet determined whether to impeach petitioner.

ARGUMENT

Except in passing, petitioner has not addressed the substance of the court of appeals' decision. He has made little attempt to show that the decision is incorrect or that the rulings of the court of appeals otherwise merit review by this Court. The fact that petitioner offers virtually no arguments directed specifically at the decision below is, in itself, sufficient reason for denying this latest petition. In any event, the decision below is fully consistent with this Court's decisions and is not in conflict with the decisions of any other court. In a number of respects, moreover, the decision turns on the particular facts of this case and has no broader legal significance. For these reasons, review by this Court is not warranted.

1. Petitioner's first two questions presented concern his broad separation-of-powers argument that the entire scheme of the Act is unconstitutional because it assigns executive functions to Article III judges, thereby undermining judicial independence. The court below properly concluded that this issue was settled by the Eleventh Circuit in its decision that this Court previously declined to review (Pet. App. 33-38). Petitioner is accordingly precluded

from raising the argument again. Moreover, any claim that the court of appeals erred in finding that he is barred from making his broad separation-of-powers argument—and petitioner has not presented any reason why the court erred—would involve nothing more than the application of settled principles of issue preclusion to the facts of this case, so that review of such a claim would not be warranted.

In any event, petitioner's broad argument, which is premised on the claim that the investigatory powers granted under the Act will undermine the independence of the judiciary, lacks merit for the reasons given by the Eleventh Circuit (783 F.2d at 1503-1510) and summarized in the oppositions to the petition for a writ of certiorari filed in that proceeding. As this Court stated in *Chandler* v. *Judicial Council*, 398 U.S. 74 (1970), there should be some mechanism short of impeachment to discipline judges whose conduct is prejudicial to the " 'effective and expeditious administration of the business of the courts' " (*id.* at 86 n.7). The Act is designed to perform this function, while recognizing that the mechanism that is least likely to intrude on the independence of the judiciary is one supervised by the judiciary itself. Moreover, while allowing the judiciary to " 'put [its] own house in order' " (*id.* at 85), the Act expressly prohibits interference with individual cases since complaints "directly related to the merits of a decision or procedural ruling" must be dismissed (28 U.S.C. 372(c)(3)).

2. Petitioner's third question presented raises his narrower separation-of-powers argument that the Act is unconstitutional because it authorizes the judicial councils and the Judicial Conference to determine and certify that impeachment may be warranted. The court of appeals correctly rejected that claim. As the court of appeals recognized (Pet. App. 41-44), the Act does not purport to

compel either the judicial councils or the Judicial Conference to determine whether impeachable conduct has occurred. It merely requires the certification of such a determination *if* the determination is made. As a result, it is unnecessary to decide (and the court of appeals did not decide) whether constitutional principles would preclude Congress from requiring such a determination. And, as the court of appeals concluded (*id.* at 45), it hardly can be constitutionally infirm for Congress to call on the judiciary to notify it formally of such a determination if it is made.

Given the discretionary character of the judicial inquiry, the only real separation-of-powers question is whether the making of such a determination by members of the judiciary impermissibly delegates the House of Representatives' exclusive power of impeachment. The courts below, like the Eleventh Circuit, correctly concluded that it does not.[4] As the district court stated (Pet. App. 93), whether the House chooses to give weight to such a determination, and, if so, how much weight it decides to give, depends entirely on the free choice of the members of the House; the House is not bound, legally or otherwise, to accept the judiciary's conclusions concerning whether petitioner or any other judge ought to be impeached. Further-

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[4] The Eleventh Circuit concluded that the Act "does not intrude upon the House's sole power of decision whether or not to impeach" by authorizing the judiciary to investigate the conduct of Article III judges and make determinations concerning whether such conduct may warrant consideration of impeachment (783 F.2d at 1510-1512). The court of appeals in this case declined to give preclusive effect to the Eleventh Circuit's decision in this regard, not because it disagreed with the Eleventh Circuit's reasoning, but because "it was by no means essential for [the Eleventh Circuit] to decide this constitutional issue in order to determine whether the subpoenas [at issue in that case] were valid" (Pet. App. 32).

more, the Judicial Conference is authorized to determine (and has determined in this case) only that consideration of impeachment *may* be warranted, not that the judge under investigation in fact should be impeached (28 U.S.C. 372(c)(8)). Accordingly, even if the House of Representatives regarded itself as somehow bound by the Judicial Conference's determination, it would be binding itself only to consider impeachment, not to impeach (see 783 F.2d at 1512). Thus, a determination of the kind made regarding petitioner simply does not trench upon the power of Congress over the impeachment process.

3. Petitioner's fourth question presented challenges other aspects of the court of appeals' decision. The court did not err in its treatment of these other arguments and, in any event, its decisions on those matters plainly do not warrant review by this Court.

As the court below concluded, petitioner's due process challenge to the combined exercise of investigatory and adjudicatory functions by the judicial councils and the Judicial Conference is foreclosed by *Withrow* v. *Larkin*, 421 U.S. 35 (1975). The Court there held unanimously that a state statute requiring a medical board both to investigate charges of misconduct and to determine whether to impose disciplinary measures does not violate due process. In so holding, the Court rejected the proposition that "the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication" (*id.* at 47). The Court reasoned that "[t]he mere exposure to evidence presented in nonadversary investigative procedures is insufficient in itself to impugn the fairness of the Board members at a later adversary hearing" (*id.* at 55). Accord, *Richardson* v. *Perales*, 402 U.S. 389, 410 (1971); *FTC* v. *Cement Institute*, 333 U.S. 683, 700-703 (1948). In light of *Withrow*, the bare fact that the judicial councils and the Judicial

Conference may exercise investigatory functions prior to determining whether impeachment may be warranted does not create an impermissible risk of bias.[5]

Petitioner's vagueness and overbreadth challenges to the Act are likewise controlled by prior decisions of this Court. With respect to vagueness, it long has been settled that "[o]ne to whose conduct a statute clearly applies may not successfully challenge it for vagueness." *Parker* v. *Levy*, 417 U.S. 733, 756 (1974); accord *Village of Hoffman Estates* v. *The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982); *Broadrick* v. *Oklahoma*, 413 U.S. 601, 608-609 (1973). In this case, the alleged conduct at the heart of the proceedings concerning petitioner—conspiracy to solicit a bribe and obstruction of justice—self-evidently constitutes "conduct prejudicial to the effective and expeditious administration of the business of the courts" (28 U.S.C. 372(c)(1)). Thus, even if it is assumed that the statutory standard might be impermissibly vague as applied to the hypothetical conduct of other judges, the court of appeals acted correctly in this case in declining to invalidate the Act on vagueness grounds.[6]

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[5] It is open to serious question, moreover, whether the determination that impeachment may be warranted constitutes an adjudication of a judge's rights and liabilities in the first instance. The Eleventh Circuit, responding to the same due process claim, concluded that "[t]o the extent a judicial council under the Act engages merely in fact-gathering * * * and certifying the possible existence of grounds for impeachment, it does not 'adjudicate' the accused judge's rights and liabilities" (783 F.2d at 1514).

[6] The Eleventh Circuit, while declining formally to decide the vagueness question for reasons of standing, stated that "the Act's standard * * * describes with adequate explicitness the judicial conduct that may be investigated" and that "with the possible exception of certain marginal cases, a judge can reasonably be expected to understand whether or not contemplated conduct will fall within the Act"

As for the overbreadth claim, "particularly where conduct and not merely speech is involved, * * * the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick,* 413 U.S. at 615. Unless "the enactment reaches a substantial amount of constitutionally protected conduct * * * the overbreadth challenge must fail." *Village of Hoffman Estates,* 455 U.S. at 494. In this case, both the language of the Act and its legislative history demonstrate that Congress did not intend the Act's prohibitions to extend to protected First Amendment speech. See S. Rep. 96-362, 96th Cong., 1st Sess. 9 (1979). As a result, the Act does not even arguably reach a substantial amount of constitutionally protected conduct and any incidental application that the Act might have to protected speech can hardly be deemed substantial in relation to the statute's plainly legitimate sweep. This Court properly can defer consideration of hypothetical speech-related applications of the Act until the time, if ever, when the Act is applied in a way that penalizes potentially protected activity.[7]

The court of appeals disposed of petitioner's remaining claims—those concerning the Compensation Clause, the

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(783 F.2d at 1513 n.22). As the Eleventh Circuit noted, in addition to the guidance provided by the language of the Act itself, Congress made clear in the Act's legislative history that it intended the Act's standard to be informed by more specific guidelines set forth in the Code of Judicial Conduct, resolutions of the Judicial Conference concerning judicial conduct, and other congressional enactments governing judicial conduct (*ibid.*; see also Pet. App. 63).

[7] The court of appeals' conclusions regarding petitioner's overbreadth claim are identical to those of the Eleventh Circuit. As the Eleventh Circuit noted, any First Amendment questions that might be raised by "marginal applications" of the Act "can be effectively dealt with by case-by-case analysis" (783 F.2d at 1513 & n.22).

adequacy of the Act's appearance and confrontation provisions, and petitioner's specific allegations of procedural unfairness in the judicial council's proceedings—without reaching their merits. Its disposition of those claims was correct for the reasons given by the court (Pet. App. 48-50, 57-59, 67-69). Equally important, the disposition of those issues involved nothing more than the application of settled legal rules to the particular facts of this case, so that review by this Court is not warranted.

Finally, while largely ignoring the specific rulings of the court of appeals in this case, petitioner offers the general complaint (Pet. 30-35) that none of the courts before which he has litigated has simultaneously addressed all of his manifold constitutional challenges to the Act. However, in each instance in which a court has declined to reach one or more of petitioner's claims, it has done so because the claims were not then presented in a sufficiently concrete or adversarial form to warrant their adjudication. This does not mean that petitioner has been denied the opportunity to litigate his many claims; to the contrary, the courts now have resolved the great majority of them. That the courts have waited for the claims to be presented in concrete form simply reflects the principle that "under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws. Constitutional judgments * * * are justified only out of the necessity of adjudicating rights in particular cases between the litigants before the Court[s]." *Broadrick*, 413 U.S. at 610-611 (citation omitted). Moreover, although the court below considered petitioner's claim that "the whole of the Act is, in essence, more unconstitutional than the sum of its parts" (Pet. App. 34), it concluded that there was no merit to that claim (*id.* at 35), and petitioner has provided no reason why that conclusion is erroneous.

CONCLUSION

The petition for writ of certiorari should be denied.
Respectfully submitted.

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No. 87-1187

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE HONORABLE ALCEE L. HASTINGS,
UNITED STATES DISTRICT JUDGE,

Petitioner,

—v.—

THE JUDICIAL CONFERENCE OF THE UNITED STATES, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF OF RESPONDENTS THE JUDICIAL COUNCIL OF THE ELEVENTH CIRCUIT AND HON. JOHN C. GODBOLD, CIRCUIT JUDGE, HON. GERALD B. TJOFLAT, CIRCUIT JUDGE, HON. FRANK M. JOHNSON, JR., CIRCUIT JUDGE, HON. SAM C. POINTER, JR., DISTRICT JUDGE AND HON. WILLIAM C. O'KELLEY, DISTRICT JUDGE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, under the circumstances of this case, Judge Hastings is entitled to a review of his broad claims as to the constitutionality of the investigatory process of the Judicial Councils' Reform and Judicial Conduct and Disability Act of 1980 (the "Act") in light of the fact that certain of his claims have already been litigated and decided finally against him in prior litigation.

2. Whether Judge Hastings is entitled to a review of his claim that the Act conflicts with the Compensation clause of the Constitution in light of the Court of Appeals' ruling that Judge Hastings failed to exhaust his administrative remedies.

3. Whether the Act's provision which states that the Judicial Conference "shall certify its determination that a judge appointed to hold office during good behavior has engaged in conduct which might constitute one or more grounds for impeachment" violates the principles of separation of powers.

4. Whether Judge Hastings' claim that the Act conflicts with the Due Process clause of the Constitution is without merit.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1187

THE HONORABLE ALCEE L. HASTINGS,
UNITED STATES DISTRICT JUDGE,

Petitioner,

—v.—

THE JUDICIAL CONFERENCE OF THE UNITED STATES, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, the Judicial Council of the Eleventh Circuit; the Honorable John C. Godbold; the Honorable Gerald Bard Tjoflat, and the Honorable Frank M. Johnson, Jr., Circuit Judges; the Honorable Sam C. Pointer and the Honorable William C. O'Kelley, District Judges, respectfully advise the Court that they do not oppose Supreme Court review of constitutional issues properly presented for decision. Issues that are not sufficiently concrete for Article III, that are premature or precluded, are not properly presented. In his Petition Judge Hastings has presented numerous issues for review. Certain of these issues are either insufficiently concrete or premature. Other issues have been litigated in other cases, finally decided, and therefore are precluded. As to other constitutional issues, these respon-

dents do not oppose review. The Court of Appeals' opinion is reported in *Hastings v. Judicial Conference of the United States*, 829 F.2d 91 (D.C. Cir. 1987), *aff'g and rev'g* 657 F. Supp. 672 (D.D.C. 1986) ("*Hastings v. Judicial Conference II*").

STATEMENT OF THE CASE

On August 25, 1986, U.S. District Judge Alcee L. Hastings brought an action in the United States District Court for the District of Columbia against the Judicial Conference of the United States (the "Judicial Conference"); the Judicial Conference's Committee to Review Circuit Council Conduct and Disability Orders; the Judicial Council of the Eleventh Circuit (the "Judicial Council"); John C. Godbold, Gerald Bard Tjoflat and Frank M. Johnson, Jr., United States Circuit Judges, United States Court of Appeals for the Eleventh Circuit; Sam C. Pointer, Jr., Chief Judge, United States District Court for the Northern District of Alabama; and William C. O'Kelley, United States District Judge, United States District Court for the Northern District of Georgia. Judge Hastings sought a preliminary and permanent injunction prohibiting the Judicial Council and the Judicial Conference from taking any action with respect to an inquiry into his judicial behavior, that had been initiated by the then Chief Judge of the Eleventh Circuit, the Honorable John C. Godbold, acting on a complaint filed pursuant to the Act. The alleged basis of the action was that the Act was unconstitutional.

Judge Hastings' complaint alleged that on August 4, 1986, an Investigating Committee (the "Committee") constituted under the Act, consisting of the five named judges of the Eleventh Circuit, had filed its report with the Judicial Council recommending that the Council determine that Judge Hastings had, in fact, engaged in the conduct for which he had been tried and acquitted, that his defense had been fabricated to avoid conviction, and that, on the basis of this determination, the Judicial Council certify to the Judicial Conference its determination that Judge Hastings had engaged in conduct that might consti-

tute one or more grounds for impeachment. At the time of the filing of his action, Judge Hastings applied for a temporary restraining order restraining any action of the Judicial Council and the Judicial Conference until the matter was heard on the merits. On August 26, 1986, the district court (George H. Revercomb, Judge) denied Judge Hastings' motion. The court ruled that Judge Hastings had not shown a likelihood of success on the merits or demonstrated irreparable harm, and, therefore, declined to interfere with the administrative process.

On September 2, 1986, Judge Hastings filed a motion for a preliminary injunction. On September 9, 1986, the Judicial Conference, its Committee to review Circuit Council Conduct and Disability Orders, the Chief Justice of the United States, and defendant-intervenor, the United States, moved the Court pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss the action for failure to state a claim upon which relief may be granted.

On September 10, 1986, the Judicial Council and the five members of its Investigating Committee filed a memorandum in opposition to Judge Hastings' motion for a preliminary injunction.

On September 11, 1986, Judge Hastings filed an Affidavit in which he stated that Judge Godbold had forwarded to the Judicial Conference on September 2, 1986, a certificate that the Judicial Council had determined that (a) in an effort to avoid conviction on the charge of conspiracy to solicit and accept a bribe in exchange for a judicial act, Judge Hastings engaged in obstruction of justice in preparing for and at trial, and gave false sworn testimony; and (b) Judge Hastings, in fact, did engage in such conspiracy.

On September 12, 1986, the district court (Gerhard A. Gesell, Judge) denied the motion, holding that the claim concerning the procedure the Judicial Conference would follow in considering the Eleventh Circuit's recommendation was not ripe, and, that, with one exception, Judge Hastings' other constitutional claims were barred by virtue of the preclusion doctrine. The claim not barred was the claim that the requirement of 28 U.S.C.

§ 372(c)(7)(B) that the Judicial Conference certify to the Congress any determination it may reach warranting the consideration of impeachment was unconstitutional. The court rejected this claim as without merit on the ground that any certification by the Judicial Conference "is merely informational, nothing more, to be granted only such weight as Congress in its wisdom wishes." *Hastings v. Judicial Conference of the United States*, 657 F. Supp. 672, 675 (D.D.C. 1986).

Judge Hastings appealed. On September 15, 1987, the court of appeals held that Judge Hastings was estopped from raising his claim that the Investigating Committee and the Council violated "the separation of powers and derogate from judicial independence"; and that the certification provision of the Act only placed a discretionary duty on the Judicial Conference and thus had no effect on the separation of powers. The court of appeals also held that Judge Hastings had not exhausted his administrative remedies with respect to the Compensation Clause claim; that the facial challenge to the Act on due process grounds lacked merit; and finally, that the claim alleging denial of due process in the investigation must be remanded to the district court to determine whether these objections were raised during the investigative proceedings and exhausted, and if so, to resolve them on the merits. *Hastings v. Judicial Conference II*, *supra*, 829 F.2d at 94.

STATEMENT OF FACTS

1. The Initial Complaint and the Appointment of the Committee

On December 29, 1981, Judge Hastings and William A. Borders, Jr. were charged, in a four count indictment returned by a grand jury in the Southern District of Florida, with conspiring to solicit and accept a bribe in exchange for influencing the out-

come of a case pending before Judge Hastings.[1] Borders' trial was severed and transferred to the Northern District of Georgia. On March 29, 1982, Borders was found guilty on all four counts. On December 10, 1982, the court of appeals affirmed his conviction. On February 6, 1983, Judge Hastings was acquitted by a jury in the Southern District of Florida.

On March 17, 1983, Wm. Terrell Hodges, Chief Judge of the Middle District of Florida, and Anthony A. Alaimo, Chief Judge of the Southern District of Georgia, filed a verified written complaint with the Clerk of the United States Court of Appeals for the Eleventh Circuit, pursuant to the Act, and the Rule for the Conduct of Complaint Proceedings under 28 U.S.C. § 372(c), as promulgated by the Judicial Council. The complaint alleged that Judge Hastings had engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts and had violated several canons of the Code of Judicial Conduct for United States Judges, in part, because Judge Hastings had conspired with Borders to obtain a bribe in return for an official judicial act.

On March 29, 1983, Chief Judge Godbold entered an order appointing an investigating committee to investigate the facts and allegations contained in the complaint. The Committee was statutorily empowered and required to "conduct an investigation as extensive as it considers necessary, and [to] expeditiously file a comprehensive written report therein with the judicial council of the circuit." Pursuant to the Act, it was required to

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1 *Count I* charged the defendants with violating 18 U.S.C. § 371 in conspiring and agreeing corruptly to ask for and to receive a sum of money for themselves in return for Judge Hastings being influenced in his performance of official acts as a United States District Judge.

Count II charged the defendants with violating 18 U.S.C. § 1503 in unlawfully, willingly, and knowingly corruptly influencing, obstructing, and impeding the due administration of justice.

Count III & Count IV charged the defendant William Borders with violating 18 U.S.C. § 1952 in unlawfully, willingly, and knowingly traveling in interstate commerce with the intent to promote, establish, carry on and facilitate unlawful activity (bribery), in violation of 18 U.S.C. § 201(c).

present to the Judicial Council both the findings of the investigation and the Committee's recommendations for necessary and appropriate action. 28 U.S.C. § 372(c)(5).

2. The Investigation Conducted by the Committee and the Challenges to its Authority by Judge Hastings

On June 3, 1983, the Committee began its investigation with the filing of a petition in the Southern District of Florida for access to the materials of the grand jury that had indicted Judge Hastings and William Borders. The Committee had determined that it needed the materials in order to perform its statutory duty to make a complete and thorough investigation. The petition did not seek public disclosure of the materials.

On June 16, 1983, Judge Hastings appeared and filed in the public file of the district court an answer and certain affirmative defenses. As part of these affirmative defenses, Judge Hastings alleged that the Committee's investigation was the result of a conspiracy among judges of the Eleventh Circuit to violate his constitutional rights. He attached as part of an appendix a copy of the complaint against him which had led to the appointment of the Committee and which theretofore had been confidential. Only the fact that a complaint had been filed, and a committee appointed, had been theretofore disclosed by Judge Godbold.

All of the district judges for the Southern District of Florida recused themselves from presiding over the matter. Judge Eugene A. Gordon, Senior Judge of the United States District Court for the Middle District of North Carolina, was specially designated to sit as a judge of the Southern District of Florida to hear the matter.

On December 19, 1983, the district court entered an order granting the petition and allowing the Committee access to the grand jury materials. *In re Petition to Inspect and Copy Grand Jury Materials*, 576 F. Supp. 1275 (S.D. Fla. 1983). On December 29, 1983, Judge Hastings filed a Notice of Appeal. On February 3, 1984, a special panel of the court of appeals stayed the

district court's order and expedited the appeal. On June 30, 1984, the court of appeals affirmed the district court's order granting the Committee's petition. *In re Petition to Inspect and Copy Grand Jury Materials*, 735 F.2d 1261 (11th Cir. 1984) ("*In re Petition*"). The court of appeals supported the district court's analysis in the special circumstances of a judicial investigation under § 372(c) of the Act.

The court of appeals also ruled that Judge Hastings' affirmative defense of a conspiracy among the judges of the Eleventh Circuit was not cognizable in the courts because the Act (§ 372(c)(10)) precluded judicial review of claims challenging the procedures that are used in any given investigation. *In re Petition*, *supra*, 735 F.2d at 1275.

On August 24, 1984, Judge Hastings petitioned the Supreme Court for a writ of certiorari. On October 9, 1984, Judge Hastings' petition was denied. *Hastings v. Investigating Committee*, 105 S. Ct. 254 (1984). On October 16, 1984, Judge Hastings petitioned for a rehearing. On November 5, 1984, the Supreme Court denied the petition for rehearing.

On December 23, 1983, Judge Hastings brought an action in the United States District Court for the District of Columbia, challenging the constitutionality of the Act and the Investigative Committee's authority to conduct its investigation. Judge Hastings' complaint contained four counts. The first alleged that the Act was unconstitutional on separation of powers and due process grounds. Count Two alleged that the application of the Act to him violated his due process rights. Count Three alleged that the Committee's investigation of Judge Hastings was the result of a conspiracy among judges of the Eleventh Circuit to violate his constitutional rights. The final count claimed that Judge Hastings' rights under the Privacy Act of 1974, 5 U.S.C. § 552a (1982), have been violated in connection with the investigation. The district court, the Honorable Gerhard A. Gesell, first rejected the claim of the United States that the only issue ripe for review was whether it was constitutional for judges to investigate judges for conduct alleged to be prejudicial to the effective and expeditious administration of the business of the

courts and held that it had the power to review the constitutionality of the Act itself.

Judge Gesell found that the Act represented a legitimate exercise of Congress' "necessary and proper" power by which Congress gave the judiciary reasonable means to put its own house in order. The district court rejected various challenges to the Act's constitutionality asserted by Judge Hastings, including the following: that the Act's provision for recommending impeachment to the House of Representatives impinged on the exclusive power of Congress over impeachment; that because impeachment is the sole means of removing an Article III judge from office, other forms of discipline short of removing a judge from office are foreclosed; that the Act is unconstitutionally vague and violates due process; and, that the Act impermissibly combines investigative and adjudicatory power, so as to render impossible a fair adjudication. *Hastings v. Judicial Conference of the United States*, 593 F. Supp. 1371 (D.D.C. 1984).

As for Judge Hastings' particular concerns with Judge Godbold's composition of the Committee and its motives for its investigation, the district court held that these were not judicially reviewable and required Judge Hastings to follow the administrative review process established in 28 U.S.C. § 372(c)(10).

Judge Hastings appealed the district court's decision. On August 13, 1985, the United States Court of Appeals for the District of Columbia Circuit held that at the time the district court rendered its decision, adjudication of the constitutional issues was premature. *Hastings v. Judicial Conference of the United States*, 770 F.2d 1093 (D.C. Cir. 1985), *vacating and remanding* 593 F. Supp. 1371 (D.D.C. 1984), *cert. denied*, 106 S. Ct. 3272 (1986) ("*Hastings v. Judicial Conference I*").

The court of appeals affirmed the dismissal of Judge Hastings' conspiracy claim on the grounds that the Court of Appeals for the Eleventh Circuit, in the litigation over whether the Committee could have access to grand jury materials, *In re Petition*, *supra*, 735 F.2d at 1275, had held that the district court was not the proper forum for addressing any underlying ques-

tions of "constitutional abuse" by the Committee members and that those concerns might be raised by Judge Hastings in a challenge to the actions, if any, taken by the Judicial Council by petition under § 372(c)(10) to the Judicial Conference for review of that action. *Hastings v. Judicial Conference I*, *supra*, 770 F.2d at 1103.

3. Proceedings Before the Committee

On April 2, 1985, Chief Judge Godbold notified Judge Hastings that the Committee would conduct proceedings in the matter of the complaints[2] filed against him, convening on May 20, 1985 in Atlanta, Georgia. Chief Judge Godbold also advised Judge Hastings as to the details of how the proceedings would be conducted and of his right to subpoena witnesses.

On May 16, 1985, Judge Hastings, through his counsel, Terence J. Anderson, filed a special and limited appearance before the Committee for the sole purpose of restating Judge Hastings' constitutional objection to the Committee's jurisdiction to take actions and to conduct proceedings to investigate his conduct in office. Judge Hastings advised the Committee that he believed the Act was unconstitutional and that the Committee had been acting improperly and without jurisdiction since its appointment and would be acting without authority in any proceedings it conducted on May 20, 1985, or thereafter. Judge Hastings advised the Committee that on the basis of this belief, neither he nor his counsel would appear at or participate in the proceedings.

A number of witnesses were subpoenaed to appear before the Committee at the proceedings which commenced on May 20, 1985. Certain witnesses declined to appear or, in some cases, appeared but declined to answer certain questions about events

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2 A second complaint involving Judge Hastings was filed under the Act on September 26, 1984. By order of December 5, 1984, Chief Judge Godbold, acting pursuant to 28 U.S.C. § 372(c)(4), referred this second complaint to the Investigating Committee.

within Judge Hastings' chambers. Betty Ann Williams, Judge Hastings' secretary, was subpoenaed to appear and bring with her certain specified records maintained in Judge Hastings' chambers. She declined to appear. Several of Judge Hastings' present or former law clerks were subpoenaed to appear and give testimony. One clerk, Alan Ehrlich, declined to appear. Two other clerks, Jeffrey Miller and Daniel Simons, appeared but refused to answer any questions about what occurred in Judge Hastings' chambers while they were employed as law clerks.

With respect to these recalcitrant witnesses, the Committee filed motions with the court of appeals to compel their testimony. Judge Hastings and the witnesses opposed the motions.

On May 20, 1985, Betty Ann Williams and Alan Ehrlich, as members of the official staff of Judge Hastings, and Judge Hastings filed a complaint in the United States District Court for the Southern District of Florida seeking injunctive and other relief. The complaint named as defendants Spencer Mercer, the Clerk of the Eleventh Circuit, and the five judges who were members of the Committee. The plaintiffs sought to challenge the validity and enforceability of the subpoenas issued under the seal of the Court of Appeals for the Eleventh Circuit at the request of the Committee. The plaintiffs moved for preliminary injunctive relief, and the defendant members of the Committee moved to dismiss the complaint for want of subject matter jurisdiction.

On May 24, 1985, a hearing was held on the pending motions before United States District Judge William W. Wilkins, Jr. of the District of South Carolina, sitting by special designation. Following the hearing, Judge Wilkins filed a Memorandum Opinion in which he concluded that the district court lacked jurisdiction over subpoenas issued by the court of appeals and ordered the dismissal of the action. *Williams v. Mercer*, 610 F. Supp. 169, 170 (S.D. Fla. 1985). In the alternative, Judge Wilkins also considered the substance of the plaintiffs' claims and found the claims to be "without merit" because the subpoenas "are . . . valid and enforceable." *Id.* at 170-171. Ac-

cordingly, Judge Wilkins ordered dismissal of plaintiffs' complaint. The plaintiffs appealed.

The Committee's pending motions to enforce its subpoenas (before the Eleventh Circuit Court of Appeals) and Judge Hastings' appeal from the district court's dismissal of his claims were set for oral argument on June 17, 1985, before the same panel of court of appeals judges which heard the appeal concerning access to the grand jury materials. On September 5, 1985, the panel directed the parties to file supplemental briefs on certain specific issues. The issues were the following:

> (1) In light of the recent opinion of the Court of Appeals for the District of Columbia Circuit in *Hastings v. Judicial Conference*, No. 84-5576 (Aug. 13, 1985) [*Hastings v. Judicial Conference I*, *supra*, 770 F.2d 1093 (D.C. Cir. 1985)], the nature and scope of the constitutional issues the court would need to determine before it could enforce the Committee's subpoenas to the witnesses in the instant case;
>
> (2) In light of the opinion of the Court of Appeals for the District of Columbia Circuit in *Hastings*, *supra*, at p. 18 [770 F.2d at 1102], whether it has now become more appropriate for this court to reach the constitutional issues, and if so, what constitutional issues this court should address at this time;
>
> (3) Whether this court should decline to address the constitutional issues for reasons stated in the opinion of the U.S. Court of Appeals for the District of Columbia Circuit in *Hastings*, *supra*, [770 F.2d at 1103] (e.g., remoteness), and if so, what constitutional issues this court should not address at this time.

4. The Decision of the Court of Appeals of the Eleventh Circuit Acting Through a Panel Designated by the Chief Justice

On February 20, 1986, the Court of Appeals for the Eleventh Circuit issued an opinion holding that: (1) it had exclusive original jurisdiction to determine motions to enforce or quash the

subpoenas issued under its seal pursuant to the Act; (2) the Committee's statutory authority to conduct an investigation and subpoena witnesses did not violate separation of powers principles or unconstitutionally intrude upon the independence of an Article III judge; (3) the constitutional and technical objections to the Committee's issuance and service of subpoenas either were beyond the court's jurisdiction, could not properly be decided in the present proceedings, or lacked merit; and (4) the subpoenas were enforceable despite invocation of a privilege protecting communications among Judge Hastings and his staff. *In the Matter of Certain Complaints under Investigation by an Investigating Committee of the Judicial Council of the Eleventh Circuit*, 783 F.2d 1488 (11th Cir. 1986), *aff'g in part and rev'g in part on other grounds Williams v. Mercer*, 610 F. Supp. 169 (S.D. Fla. 1985), *cert. denied sub nom. Hastings v. Godbold*, 106 S. Ct. 3273 (1986) ("*In the Matter of Certain Complaints*").

In its opinion, the court of appeals pointed out that it was not powerless to protect the integrity of its process, and that the Act's goals of maintaining public confidence in the judiciary and promoting the effective administration of justice require that investigations into alleged judicial misconduct be concluded as expeditiously as is reasonably possible, lest a sitting Article III judge be compelled to function under a cloud of doubt and suspicion for any longer than is absolutely necessary. *Id.*, 783 F.2d at 1498.

As to the existence and investigative authority of the Committee, the court of appeals held that the Act did not impermissibly assign executive power, including the subpoena power, to judicial officers because the judiciary's ability to administer the business of the courts has been firmly established and is little doubted, and the Committee was concerned solely with matters affecting the management, reputation and integrity of the judiciary itself. The court relied on the Supreme Court's decision in *Chandler v. Judicial Council*, 398 U.S. 74, 86 n.7, 90 S. Ct. 1648, 1654 n.7 (1970), which recognized the judicial council's ability, as an administrative body, to make "all necessary or-

ders for the effective and expeditious administration of the business of the courts . . . ." *In the Matter of Certain Complaints*, *supra*, 783 F.2d at 1504-05.

The court of appeals also held that the Committee's authority to conduct an investigation did not unconstitutionally intrude upon the independence of a sitting Article III judge. The court of appeals again relied heavily on the *Chandler* case which approved of the judiciary's ability to "put its own house in order" and take reasonable measures to administer the courts. The court concluded that the complaint procedure established by the Act and the mechanism for investigating such complaints was reasonable and not overly threatening to judicial independence. *In the Matter of Certain Complaints*, *supra*, 783 F.2d at 1507.

The court of appeals also addressed various remedial measures that the Committee might recommend and the judicial council could possibly adopt, including a certification that grounds for impeachment might exist. After careful consideration, the court upheld the constitutionality of such certification, finding that it would not "chill" a judge's independence any more than the existence of the impeachment power itself. In considering this issue, the court noted that the Constitution's impeachment provisions do not require that the House of Representatives itself perform all preliminary investigatory functions that ultimately might inform its decision whether to impeach. Therefore, the court held that the Constitution does not detract from Congress' powers to grant to judicial councils authority to undertake an investigation of an Article III judge with an eye to determining whether or not potential grounds for impeachment may exist:

> "The House is free to act upon this information or ignore it, as it chooses. Nothing in the Act effects any change in the impeachment procedures or standards to be followed in the House."

Id., 783 F.2d at 1511.

The court acknowledged that the prospect of impeachment is far more serious than the possibility of imposition of some of the relatively minor sanctions authorized by the Act. Arguably, the court said an investigation into conduct that might constitute one or more grounds for impeachment threatens a "more troublesome chill" of judicial independence insofar as it is directed in part at determining whether to recommend consideration of impeachment. But the Court said:

> "whatever chilling effect may result from the threat of impeachment is a more or less inevitable concomitant of Congress's power to impeach. Where a complaint made against him involves matters of such seriousness, an accused judge—as was true even before the existence of the Act—will almost certainly be aware that impeachment is a possibility. The provision of an orderly, less hit-or-miss method of providing Congress with information about such a possible offense is not "unfair" to the judge. That only the House can impeach does not imply that the subject of possible impeachment can count on the absence of this further mechanism to inform Congress that a problem warranting its attention may have arisen."

Id., 783 F.2d at 1511.

5. Further Proceedings Before the Committee

The Committee held proceedings and took sworn testimony on seven different occasions: in Atlanta, Georgia, on May 20-31, 1985, and August 12-17, 1985; in Darlington, South Carolina, on September 4, 1985; in Atlanta, Georgia, on October 1-2, 1985, October 24, 1985, April 7-11, 1986, July 8-9, 1986.[3] In each instance, Judge Hastings received a notice of the hearing similar to the one he received prior to the Committee's initial hearing. Judge Hastings did not participate at any of the hearings.

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3 Brief proceedings were held on August 6 and 8, 1986 to complete the record of all exhibits which had been referred to at earlier proceedings.

6. Proceedings Before the Judicial Council

On August 4, 1986, Chief Judge Godbold advised Judge Hastings in a confidential notice that the Judicial Council had received the Report of the Investigating Committee and that the Judicial Council was prepared to make the Report available to him and/or his attorney for examination, subject to the confidentiality provision of 28 U.S.C. § 372(c)14.

The notice specified that the Report could be examined at the headquarters of the Eleventh Circuit in Atlanta on or before August 19, 1986. The notice also provided that the material could not be copied or removed from the premises.

On August 18, 1986, in response to the aforesaid notice, Judge Hastings filed a request for a copy of the Report and for additional time to determine whether a response would be appropriate. In his request, Judge Hastings acknowledged that he and his counsel had traveled to Atlanta to examine the Report, but he stated that he had not had enough time to decide whether a response should be filed with the Judicial Council, or for his counsel to prepare a meaningful response.

On August 20, 1986, Acting Chief Judge Paul H. Roney entered an order granting Judge Hastings until 5:00 p.m. on August 26, 1986, to file his response. The order provided that up to that time, Judge Hastings and his counsel could continue to have the right to examine the Report at the headquarters of the Eleventh Circuit. In his order, Judge Roney recited the notices which Judge Hastings had received prior to the Committee's proceedings and noted that Judge Hastings had chosen not to examine the evidence at those proceedings.

On August 25, 1986, Judge Hastings entered a Special and Limited Appearance before the Judicial Council for the sole purpose of restating and renewing his constitutional objections to the Judicial Council's jurisdiction to take action and to conduct proceedings with respect to his conduct in office.[4] He told the Judicial Council:

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4 On August 25, 1986, Judge Hastings brought this action in the United States District Court for the District of Columbia.

Judge Hastings believes that the Investigating Committee was constituted and acted improperly and without jurisdiction from the time of its appointment and throughout proceedings it conducted. Judge Hastings believes that the Report and record before the Council are the unconstitutional product of that improper investigation. Judge Hastings also believes that the Investigating Committee and the Council have further violated his rights in refusing to supply him with a copy of the Report and restricting the time and place for access to the Report and records compiled by the Investigating Committee.

Judge Hastings has renewed his constitutional claims challenging the constitutionality of the Judicial Council Reforms and Judicial Conduct and Disability Act of 1980 (the "Act"), Pub. L. No. 96-458, 94 Stat. 2035 (1980), *codified at* 28 U.S.C. § 331, 332, 372(c), 604(h)(i) (1982), before the United States District Court for the District of Columbia. *Hastings v. Judicial Conference of the United States*, Civ. No. 86-2353 (D.D.C. *filed* Aug. 25, 1986) [*Hastings v. Judicial Conference II*, *supra* 829 F.2d 91 (D.C. Cir. 1987)]. That suit also joins the Council and members of the Investigating Committee as defendant and renews and supplements Judge Hastings's claims that the manner in which the Act has been implemented in the Eleventh Circuit and has been construed and applied in proceedings against him are unconstitutional.

For those reasons, except for filing this Special and Limited Appearance, neither Judge Hastings nor his counsel will otherwise appear or participate in the proceedings before the Council until such time as these constitutional claims have been finally adjudicated.

On August 29, 1986, the Judicial Council unanimously adopted a resolution accepting and approving the Report of the Investigating Committee and resolved to forward a certification to the Judicial Conference in accordance with § 372(c)(7)(B).

On September 2, 1986, the aforementioned certificate was issued by Chief Judge Godbold. On the same day, copies of the resolution and certificate were forwarded to Judge Hastings.[5]

7. Proceedings Before the Judicial Conference

On March 17, 1987, the Judicial Conference certified to the House of Representatives that "consideration of impeachment may be warranted." The certification explained:

> The Judicial Conference has exercised its authority under 28 U.S.C. § 372(c)(8) to consider the certificate of the Judicial Council of the Eleventh Circuit. In so doing, the Judicial Conference had before it the certificate of the Judicial Council of the Eleventh Circuit, filed pursuant to 28 U.S.C. § 372(c)(7)(B), the report of the Investigating Committee appointed by the Chief Judge of the Eleventh Circuit pursuant to 28 U.S.C. § 372(c)(4)(A), the record and exhibits compiled by that Committee, and a Statement and Provisional and Preliminary Report prepared by counsel for Judge Hastings and filed with the Judicial Conference in response to the invitation set forth in a Resolution adopted by the Conference on September 17, 1986.

8. The Decision of the Court of Appeals, D.C. Circuit

On September 15, 1987, the United States Court of Appeals for the District of Columbia Circuit issued an opinion holding that:

a. The issue as to the powers conferred by § 372(c) on an investigating committee and a judicial council to investigate and to have subpoenas issued was precluded by the Eleventh Circuit's decision in *In the Matter of Certain Complaints*, *supra*. *Hastings v. Judicial Conference II*, *supra*, 829 F.2d at 99.

b. While *In the Matter of Certain Complaints*, *supra*, did not preclude reconsideration of the merits of the certification issue,

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5 On September 12, 1986, the district court denied Judge Hastings' motion for a preliminary injunction, and Judge Hastings appealed. *Infra*, p. 3.

the claim was without merit. The court of appeals based its decision on a determination, on statutory interpretation grounds, that the certification provisions of § 372(c) are discretionary, not mandatory, with the consequence that the certification provision "is without substantial constitutional significance." The Court "reach[ed] this conclusion not merely to avoid a reading that might place the constitutionality of the Act in doubt, but because a fair reading of the Act supports this interpretation." *Hastings v. Judicial Conference II*, *supra*, 829 F.2d at 101-02 (footnote omitted).

c. Even if the compensation clause does require that petitioner be reimbursed the cost of his defense, "the authorities charged with administration of the Act should at least have an opportunity to construe the Act in a manner that comports with the Constitution," and they had been given no such opportunity. *Id.*, 829 F.2d at 103.

d. There was no merit to Judge Hastings' overbreadth claim because the Act is directed primarily against judicial misconduct, not against protected First Amendment activities. *Id.*, 829 F.2d at 106.

e. As to Judge Hastings' due process as applied claim, the case was remanded to the district court for further proceedings. *Id.*, 829 F.2d at 107.

RESPONDENTS' RESPONSE

1. Judicial Review Does Not Permit a Plenary Consideration, and Reconsideration in a Single Proceeding of Numerous Constitutional Issues, Some of Which are Precluded from Consideration.

While these respondents favor the review by this Court of the constitutional issues arising out of 28 U.S.C. § 372(c) that are properly presented, the public interest would not be served were this Court to disregard the principles of Article III concreteness, of preclusion, of prematurity, and of judicial review itself.

Judge Hastings seeks through this writ a plenary consideration and reconsideration in a single proceeding of numerous constitutional issues, including issues precluded from consideration and others not ripe for consideration.

Judge Hastings asserts that he is not issue-precluded by *In the Matter of Certain Complaints*, *supra*, from rearguing in this case "his broad claims relating to the constitutionality of the investigatory process described by the Act." *Hastings v. Judicial Conference*, *supra*, 829 F.2d at 100. Judge Hastings contends that there has been a "fragmented analysis" of the Act, and that this is inappropriate and has obscured the constitutionality of the Act considered as a whole. The District of Columbia Circuit rejected this argument as inconsistent with the normal process of reviewing portions of a statute that are ripe for review.

The choice of selecting constitutional issues and litigating them *seriatim* was made by Judge Hastings. He argues that he pursued his claims *seriatim*, over a period of four years, in order to present the issues to this Court on a proper record. He maintains that now that the Act has been fully implemented, and all participating entities having exercised the powers assigned to them by the Act, review of all issues at one time is appropriate. This contention, as the court of appeals noted, is "no more than an unsuccessful litigant understandably seeking a second chance." *Hastings v. Judicial Conference II*, *supra*, 829 F.2d at 100. Petitioner sought to prevent and to limit the investigation against him by asserting constitutional barriers. On those claims that have been adjudicated against him, he is not entitled to a reconsideration on the ground that the proceedings that he sought to frustrate have been completed.

Whether the D.C. Circuit correctly applied rules of issue preclusion is not an issue worthy of certiorari. However, if certiorari is granted, the decision of the court of appeals is clearly correct.

2. The Court of Appeals' Decision that the Judicial Conference's Certification to the House of Representatives that Impeachment May Be Warranted Does Not Render the Act Invalid.

The district court considered the merits of petitioner's claim that § 372(c)(8), which provides for certification to the House of Representatives by the Judicial Conference of a determination that an Article III judge has engaged in conduct which might constitute grounds for impeachment, is unconstitutional. The district court reached the merits despite the fact that in *In the Matter of Certain Complaints*, *supra*, the Eleventh Circuit had considered the same claim on the merits and had rejected it. The court of appeals affirmed the district court. This issue is open for review by this Court. These respondents do not oppose review.

3. The Court of Appeals' Decision that Judge Hastings Had Not Exhausted His Administrative Remedies Does Not Raise a Question of Federal Law that Has Not Been but Should Be Settled by the Supreme Court

Judge Hastings' compensation clause claim was denied because he had failed to exhaust the administrative remedies available to him. Judge Hastings made no request of the Judicial Council or the Judicial Conference for reimbursement of his attorney's fees, thereby denying to both of these bodies a chance to determine whether these fees were a "necessary expense incurred" by either body. The court of appeals noted that even if the compensation clause does require that petitioner be reimbursed the cost of his defense, "the authorities charged with administration of the Act should at least have an opportunity to construe the Act in a manner that comports with the Constitution." They have been given no such opportunity. *Hastings v. Judicial Conference II*, *supra*, 829 F.2d at 103.

4. Judge Hastings' Claim of Denial of Due Process Because the Act Is Overbroad and Vague

The court of appeals reached the merits of this claim. It rejected the overbreadth argument because the Act is directed primarily against judicial misconduct, not against protected First Amendment activities. The court held the provisions of the Act itself and the legislative history demonstrate that the Act is directed against serious judicial misconduct, not against protected speech. To the extent that some "margin" may exist for reading the Act to apply to protected First Amendment activity, the court held that this is outweighed by the legitimate and important objective of the Act. With respect to vagueness, the court held the charges against petitioner are squarely within the statutory prohibition, and Judge Hastings cannot complain of the vagueness of the law as applied to the conduct of others.

The respondents do not oppose the grant of a writ on this issue. If such a writ is granted, these respondents respectfully urge that the decision of the court of appeals be summarily affirmed.

This claim is so clearly without merit that the court of appeals should be summarily affirmed.

5. The Court of Appeals Decided that the Issue of Whether Judge Hastings Was Denied Due Process by the Investigatory Committee be Remanded for Further Proceedings. Certiorari Is Not Appropriate to Review Such a Decision.

The district court held this claim was precluded. The court of appeals reversed and remanded on this issue.[6] Certiorari is not appropriate for such a decision.

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6 The Court of Appeals deferred considering the issue of facial due process until after the remand.

CONCLUSION

Judge Hastings contends that the court of appeals engaged in "the manipulation of avoidance doctrine," and that its decision is founded on "unacknowledged political considerations." Judge Hastings contends that political considerations rendered the court of appeals unwilling to take the responsibility for adjudicating the validity of the Act, an Act sought by the judiciary as a political compromise. Arguments of this nature require no comment.

For the foregoing reasons, these respondents respectfully suggest that the decision of the court of appeals should be affirmed.

Dated: March 18, 1988
New York, New York

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No. 87-1187

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1987

THE HONORABLE ALCEE L. HASTINGS,
UNITED STATES DISTRICT JUDGE,

Petitioner,

v.

THE JUDICIAL CONFERENCE
OF THE UNITED STATES, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONER'S REPLY

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March 29, 1988

TABLE OF AUTHORITIES

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Morrison v. Olson, No. 87-1279, prob. juris. noted, 56 U.S.L.W. 3568 (Feb. 22, 1988).....10 n.11

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PETITIONER'S REPLY

In petitioner's view, both of the briefs filed in response to the petition illustrate and confirm reasons why the Court should grant review in this case. Petitioner submits this reply to apprise the Court of the basis for that view and

to respond to matters presented in those briefs that might otherwise be misleading.

1. The Solicitor General's brief in opposition does not address or dispute the importance of the constitutional questions presented.[1] The brief, instead, is largely confined to an argument that the issues were thoroughly considered and correctly decided by the court below and in the related litigation that preceded that decision. After proper briefing and argument on the merits, the Court may itself reach that conclusion. That is not, however, a decision that the Court can or should make in deciding whether to grant a petition that poses constitutional ques-

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1. Brief for United States in Opposition ("U.S. Br."). The Solicitor General has filed a brief on behalf of four of the ten respondents -- the Judicial Conference of the United States, the Chief Justice of the United States, the Conference's Committee to Review Circuit Council Conduct and Disability Orders, and the United States. U.S. Br. at n. 1. The remaining respondents are separately represented. See note 4 infra.

tions of first impression and substantial importance. The decision the Court must immediately make is whether the questions presented are such that authoritative resolution by this Court is required.

The importance of those questions is not open to serious debate. The petition asks the Court to consider and authoritatively determine the constitutionality of the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 (the "Act").[2] The then members of this Court debated the need for some such legislation in 1970. Chandler v. Judicial Council of the Tenth Circuit, 395 U.S. 74 (1970). Although they were divided on that issue, each of the participating Justices recognized that any such plan would necessarily pose constitutional questions of a sub-

2. Pub. L. No. 96-458, 94 Stat. 2035 (1980), codified as amended at 28 U.S.C. §§ 331, 332, 372(c), 604(h) (1982 & Supp. 1984).

stantial nature. Both the nature and importance of those issues has been confirmed by the published debates that have preceded and followed the adoption of the Act. The decision below and those in the related litigation confirm that conclusion.[3]

The present petition asks the Court to determine whether the specific statutory plan embodied in the 1980 Act can be reconciled with the constitutional plan embodied in the 200-year old Constitution. The issues raised are issues that only this Court can resolve. They are not issues that can properly be left for resolution in litigation in the lower courts of the kind that preceded the decision below. This case presents a proper record for the

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3. These points are developed more fully in petitioner's Petition for Writ of Certiorari ("Pet.") at 4-6 and 29-30. The supporting authorities are identified in the text and accompanying notes presented there.

Court's consideration. The Solicitor General's views on the merits of the issues do not undermine the need for this Court to resolve them authoritatively in this case.

2. The Eleventh Circuit respondents do not oppose the grant of review, but argue that it should be limited to the certification and facial due process issues.[4] Petitioner agrees that those two issues, standing alone, are sufficiently important to merit review by this Court. He submits, however, that the arguments that the

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4. Brief of Respondents the Judicial Council of the Eleventh Circuit and Hon. John C. Godbold, Circuit Judge, Hon. Gerald B. Tjoflat, Circuit Judge, Hon. Frank M. Johnson, Jr., Circuit Judge, Hon. Sam C. Pointer, District Judge and Hon. William C. O'Kelley, District Judge in Opposition to Petition for Writ of Certiorari ("11th Cir. Br."). The special committee appointed to investigate the complaint filed in 1983 retained Mr. John Doar, initially as their chief investigator and later as their chief counsel. Mr. Doar has represented the Eleventh Circuit respondents in all subsequent matters involving Judge Hastings.

scope of review should be limited by the order granting the writ are premature. After full argument, the Court might decide that prudential concerns such as those identified dictated limiting its decision to only those or other specific issues. Petitioner submits that the Court should not handicap itself, at this stage, by limiting the scope of review on the partial record now before it. Instead, the petition should be granted, and questions concerning the scope of the review should be deferred until the Court has received full briefing and heard argument at which questions concerning the proper scope of review may be fully explored along with the merits.

3. There are two additional aspects of the brief submitted by the Solicitor General that require comment. The Solicitor General misperceives the question pre-

sented.[5] The suit below sought a declaratory judgment that the Act is unconstitutional. Petitioner sought to enjoin the Conference from certifying certain proceedings against him to the House only to preserve the status quo. Petitioner has long since abandoned any claim for injunctive relief with respect to those proceedings. He did not suggest in the court of appeals and does suggest in this Court that any relief against the House is appropriate in this case. His challenges are no longer directed at those proceedings except as they bear upon the need for declaratory relief to prevent similar proceedings in the future.[6]

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5. U.S. Br. at (I); cf. 11th Cir. Br. at i; Pet. at i-iii.

6. The impeachment inquiry provoked by the Conference's certificate is still before the Criminal Justice Subcommittee of the House Committee on the Judiciary. Insofar as counsel for petitioner is aware, no hearings have been held. The prospect that the House would impeach and the Senate convict a judge on charges upon which a jury acquitted him more than five years

The Solicitor General's brief also ignores the fact that there are two additional complaints against petitioner that are being investigated pursuant to the Act -- one urging that he be sanctioned for giving a political speech in a church and the other alleging that he improperly disclosed to a third party confidential information he acquired in the course of his duties as a judge. The existence of those proceedings makes it clear that the claimed injury to petitioner is ongoing and that meaningful relief can still be afforded.[7]

4. Both responsive briefs properly devote considerable attention to the proceedings against petitioner under the Act

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ago seems remote, and petitioner submits that it should not be a factor here. In any event, if petitioner were impeached and removed before a decision was reached in this case, the Court might then consider whether the writ should be vacated as improvidently granted.

7. See Pet. at 11, 17-19.

and to petitioner's persistent efforts to obtain a definitive adjudication of the constitutionality of the Act.[8] As petitioner reads those briefs, the Solicitor General takes the position that petitioner has achieved that objective and the issues do not require or merit this Court's attention.[9] The Eleventh Circuit respondents, although agreeing that narrow review may now be appropriate, implicitly criticize petitioner for the very vigor and aggressiveness with which he has pursued his challenges to their authority.[10] Both positions provide additional reasons why review should be granted rather than denied in this case.

The Court will have to determine the constitutionality of the Act at some point. The very vigor with which peti-

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8. U.S. Br. at 4-7; 11th Cir. Br. at 4-17.
9. U.S. Br. at 11-17.
10. 11th Cir. Br. at 6-19.

tioner has pursued his claims and with which respondents have exercised the powers they claim under the Act has created a record that presents the issues concretely and that will facilitate their proper adjudication by this Court. The burdens that petitioner has assumed and that the litigation and administrative proceedings have imposed upon the respondents and the courts as well as him are not the kinds of burdens that should have to be assumed or imposed again simply to create again the record necessary to a proper adjudication by this Court. Only a decision by this Court in this case can eliminate the need for such a repetition. In petitioner's view, that provides an additional reason why review should be granted here.[11]

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11. The Court's decision to grant review in Morrison v. Olson, No. 87-1279, prob. juris. noted 56 U.S.L.W. 3568 (Feb. 22, 1988), also supports the view that review should be granted here. The Court has already agreed to determine whether the appointment and supervisory powers

Accordingly, petitioner respectfully submits that the petition should be granted so that the questions presented may be considered and resolved by this Court.

Respectfully submitted,

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assigned the courts with respect to independent counsel appointed to investigate and prosecute officers of the executive branch are consistent with the constitutionally mandated allocation and separation of powers. The presence of similar issues makes review appropriate in this case also.